

No. 89-1408

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE,
THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

- I. Whether the 42 U.S.C. 1985(3) requirement of class-based animus is satisfied by a class of women in general or a subclass of women abortion-seekers?
- II. Whether brief non-violent sit-in demonstrations of a few hours occurring on public sidewalks in front of facilities in which abortions are performed violate the interstate Right to Travel of the plaintiffs or the purported individual women they were allowed to represent?
- III. Whether the contempt fines of \$50,000 (originally payable to plaintiff National Organization for Women, modified by the circuit court to be payable to the United States) and \$19,141 (payable to the City of New York for police overtime), imposed on motion papers without a hearing, against defendants Randall Terry and Operation Rescue for engaging in two days of public demonstrations at two separate locations, were criminal in nature requiring due process protections for the defendants?
- IV. Whether there existed genuine disputes of substantial material facts so as to preclude the district court from granting summary judgment under the doctrine of *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)?
- V. Whether public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes may be treated in all respects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?
- VI. Whether the plaintiffs and plaintiff-intervenor lack Article III standing due to lack of a cognizable harm to any plaintiff?

- VII. Whether the imposition of discovery sanctions against defendants and their *pro bono* counsel was an abuse of discretion in view of the constitutional privileges asserted?

PARTIES

In addition to the Petitioners and Respondents listed in the caption, the following are also Respondents in this action: New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro Choice Coalition.

The United States of America was added as a party as a result of the court of appeals judgment below. Petitioner OPERATION RESCUE is not a corporation under Rule 28.1 of the Rules of this Court.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCI-
ATE JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Petitioners Randall Terry, Operation Rescue,¹ Rev. James P. Lisante and Thomas Herlihy respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

1 Operation Rescue is not a corporation under Rule 28.1 of the Rules of this Court. Its status as a separate entity was an issue in the courts below.

OPINIONS BELOW

The opinion of the court of appeals (set forth at pages A-1 to 52 of the Appendix to this Petition) is reported at 886 F.2d 1339 (2d Cir. 1989). The district court opinion on discovery and sanctions is unreported (set forth at pages A-56 to 74 of the Appendix). The district court opinion on contempt (set forth at pages A-78 to 103 of the Appendix) is reported at 697 F.Supp. 1324 (S.D.N.Y. 1988). The district court summary judgment opinion (set forth at page A-115 to A-143 of the Appendix) is reported at 704 F.Supp. 1247 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989 (A-151 to 152). The order of the court of appeals denying the petition for rehearing *en banc* was entered on November 7, 1989 (A-147 to 148). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). A timely motion for extension of time to file this petition to March 5, 1990, was granted by Mr. Justice Marshall on January 29, 1990, Application No. 89-534.

STATUTORY PROVISIONS

Section 1985(3) of Title 42 of the United States Code ("Section 1985(3)") is set forth at page A-153 to 154 of the Appendix.

STATEMENT OF THE CASE

The decision of the Second Circuit affirming with one modification five judgments and orders of the district court has created an unprecedented body of rulings in clear contradiction of binding precedents of this Court. Given the ongoing national debate over abortion and the First Amendment implications of the panel's opinion, Petitioners respectfully submit that the vital issues raised in this appeal should be addressed by this Court.

This case involves the validity of injunctions against anti-abortion demonstrations in the City of New York and its environs, which injunctions provide for a \$25,000 fixed unconditional fine *against each individual* for its initial violation and a doubling of the fine for each successive violation, *i.e.*, \$50,000, then \$100,000, then \$200,000, etc. Unconditional contempt fines imposed on motion papers without a hearing of \$50,000 (originally payable to Respondent National Organization for Women, but modified by the panel to be payable to the United States) and \$19,141 (to the City of New York for police overtime because of failure to give 12 hours advance notice of the exact location of the demonstration) have already been imposed against Petitioners Terry and Operation Rescue for violations.²

This case arises in the context of political action and public protests, including "Operation Rescue" blockades of abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The miracle of conception and growth of human life within a mother's womb has been scientifically observed, documented and described.³ However, since *Roe v. Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations have occurred nationwide. Hundreds have been arrested in the New York City area alone.

The United States experienced similar wrenching social upheaval and political division with the Civil Rights and Vietnam war protests of previous decades.⁴ The evident and powerful result of deeply held beliefs by Americans has always been political protest and civil dissent. It is certain that abor-

2 Subsequent to the affirmance by the Second Circuit, the United States became a party to this action as Judgment Creditor of the \$50,000 contempt fine and has vigorously pursued collection of this judgment, seizing the Christmas payroll of Operation Rescue on December 22, 1989.

3 *New Perspectives on Human Abortion*, Part I, Sec. 2: E. Blechschmidt M.D., *Human Being from the Very First* (1981).

4 Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987).

tion is the most divisive public issue of the last two decades,⁵ perhaps the greatest national political and moral question since slavery.

In this case the district court granted summary judgment against the petitioners under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3). The demonstrators were held to have had an invidiously discriminatory animus against a subclass of "women seeking abortions," violating their interstate Right to Travel, although it was evident that the demonstrations were aimed at the general public, and no evidence of any individual women whose interstate Right to Travel is claimed to have been violated was offered.

The following remarks of Justice O'Connor are appropriate as a prism through which the lower courts' decisions in this case may be viewed:

Today's decision goes further, and makes it painfully clear that *no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.*

* * *

In so doing, the Court *prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness.* The constitutionality of the challenged provisions was not properly before this Court. There has been *no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality of the statute.*

* * *

Appellants should not have to prove that they are entitled to an opportunity to be heard. (Emphasis added)

Thornburgh v. American Coll. of Obst. and Gyn., 476 U.S. 747, 814-816 (1986) (O'Connor, J., dissenting). Through numerous denials of Petitioners' requests for hearings, and a

⁵ *Webster v. Reproductive Health Services, et al.*, 492 U.S. _____, 106 L. Ed.2d 410, 463 (1989) (Blackmun, J., dissenting and concurring in part).

misuse of the summary judgment procedure, the lower courts have repeatedly denied the Petitioners their entitled opportunity to be heard on constitutional issues of national import.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Erroneously Held That Subgroupings of Gender-Based Animus Come Within the Purview of § 1985(3)

By finding that a subgrouping of gender, "women seeking abortions," was a sufficient class for § 1985(3), the Second Circuit has rejected the caution expressed by this Court in *United Broth. of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 835 (1983), where this Court specifically refused to affirm that § 1985(3) "reaches conspiracies other than those motivated by racial bias." If it does, then this Court should say so and why.

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V), The Ku Klux Klan Act of 1871.⁶ The subject matter is abortion. Intervention by this Court is critical at this time to clarify the boundaries of the meaning of "class of persons" and "invidiously discriminatory animus," in a manner that lower federal courts can not mistake. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, *supra*, are now being completely ignored by circuit courts, most stridently by the Second Circuit in this case.

6 A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Board of Carpenters and Joiners, Local 610 v. Scott, *supra*, at 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

The chart below sets forth in graphic terms the broad nationwide circuit conflict and resulting confusion over the application of Section 1985(3).

CIRCUIT	CLASS BASED ANIMUS
First	No circuit cases reach this issue
Second	Extremely broad view that women in general constitute a class as well as a subgrouping of "women seeking abortions" and wide standard of animus; ⁷ Religion; ⁸ political affiliation ⁹
Third	Intra-circuit conflict: open question on class, ¹⁰ Sex ¹¹
Fourth	Intra-Circuit Panel Conflict; Race only; ¹² Race & Religion; ¹³ Race, National Origin & Sex. ¹⁴

7 *N.Y. State Nat. Organization for Women v. Terry*, *supra* (A-37 to 43). Expansive view that "animus merely describes a person's basic attitude or intention." (A-42) *Cousins v. Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989) (women seeking abortions).

8 *Colombrito v. Kelley*, 764 F.2d 122, 130-131 (2nd Cir. 1985).

9 *Keating v. Carey*, 706 F.2d 377, 386-388 (2nd Cir. 1983).

10 *Robinson v. Canterbury Village*, 849 F.2d 424, 430, n.7 (3rd Cir. 1988) (but non-minority employee speech against racist employer practices is sufficient, citing prior case).

11 *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3rd Cir. 1978) (*en banc*), *rev'd on other grounds*, 442 U.S. 366 (1979); *Roe v. Operation Rescue*, 710 F.Supp. 577, 581 (E.D. Pa. 1989) (following *Novotny*, "women seeking abortions" approved).

12 *Harrison v. KVAT Food Management Inc.*, 766 F.2d 155 (4th Cir. 1985) (in depth analysis of Congressional intent and *Scott*: race only); *Mears v. Town of Oxford, M.D.*, 762 F.2d 368 (4th Cir. 1985) (race only)

13 *Trerice v. Summons*, 755 F.2d 1081, 1085 (4th Cir. 1985).

14 *Bushi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *NOW v. Operation Rescue*, Civil Action No. 89-1558-A, slip op., 1989 U.S. Dist. Lexis 14919 at 21-22 (D.Va. December 6, 1989) (following *Bushi*, "women seeking abortions" approved).

- Fifth Intra-Circuit Conflict: 1) Race only;¹⁵ 2) Race & Religion;¹⁶ 3) Race, National Origin, Sex & and political beliefs and associations;¹⁷ 4) Rejected women of childbearing age seeking medical attention [abortions].¹⁸
- Sixth Racial and Political classes.¹⁹
- Seventh Intra-Circuit panel conflict: 1) Race only;²⁰ 2) Race, Sex, Religion, Ethnicity, and Political Loyalty.²¹
- Eighth Sex and Ethnicity.²²

15 *Daigle v. Gulf Utilities Co.*, Local 2286, 794 F.2d 974, 978-79 (5th Cir. 1986); *Eitel v. Holland*, 787 F.2d 995, 1000 (5th Cir. 1986); *Rayborn v. Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1986).

16 *Roe v. Abortion Abolition Society*, 811 F.2d 931, 933-936 (5th Cir. 1987) (rejected class of those who do not share the defendant's anti-abortion views based on religion; protected classes are race and possibly religion).

17 *McLean v. International Harvester Co.*, 817 F.2d 1214, 1218-1219 (5th Cir. 1987) (caution beyond race, but cited pre-*Scott* Fifth Circuit cases allowing classes of 1) immutable characteristic such as race, national origin or sex; and 2) political beliefs and associations).

18 *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (class of "women of childbearing age who seek medical attention from the [plaintiff clinic]" was "so under-inclusive as to mischaracterize the dispute" and *did not* constitute a proper class. Insufficient "class-based invidiously discriminatory animus" as "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions," including "men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Id.* at 794-95. The Petitioners in the case at bar have this identical broad animus).

19 *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987).

20 *Damato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (rejecting class of handicapped, race only); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985) (race only).

21 *Volk v. Koler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

22 *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

- Ninth Intra-Circuit Panel Conflict: 1) Race only;²³
2) Sex;²⁴ and 3) Classes granted special protection by Congress or courts.²⁵
- Tenth Restricted to race, in accordance with Congressional intent and this Court's decision in *Scott, supra*.²⁶
- Eleventh Race alleged; issue at beyond race not reached²⁷
- D.C. Race and Political affiliations with Racial overtones.²⁸

The range of class-based animus currently extends from a strict adherence to race, all the way to women in general and especially women "abortion seekers". Of all the circuit courts, the Second Circuit, by its reasoning, has cast Section 1985(3) the furthest into uncharted waters:

By its very language § 1985(3) is necessarily tied to *evolving notions of equality and citizenship*. As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act. (Emphasis added) (A-40)

23 *Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1986) (race only); *National Abortion Federation v. Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) (rejecting "women seeking abortions").

24 *Reichard v. Life Ins. Co.*, 591 F.2d 499, 505 (9th Cir. 1979) (a class of women in general who purchase disability insurance); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (following *Reichard*, "women seeking abortions" approved).

25 *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (beyond race if Congress or courts have given class special protections).

26 *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983); *Brown v. Reardon*, 770 F.2d 896 (10th Cir. 1985).

27 *Brown v. Masonry Products, Inc.*, 874 F.2d 1476 (11th Cir. 1989). *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

28 *Hobson v. Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (Open question beyond racial animus, but dissent would hold gender discrimination within Section 1985(3)).

Contrast this open-ended jurisprudence to the more prudent approach of the Tenth Circuit:

In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend . . . [Section] 1985 to classes other than those involved in the strife in the South in 1871 with which congress was then concerned. In fact from *Scott* we get a signal that the classes covered by . . . [Section] 1985 should not be extended beyond those already expressly provided by the Court.²⁹

Despite the cautions from this Court in *Griffin*³⁰ and *Scott*³¹, the Second Circuit has brashly ignored the wisdom of limiting Section 1985(3). While giving lip service to Congressional intent and *Scott*, the Second Circuit has vastly extended the reach of this statute to protect almost any conceivable subgroup of the majority of the American population, recklessly opening a Pandora's Box of claims and claimants Congress never intended to be covered by the statute. *Wilhelm*, 720 F.2d at 1176; *Harrison*, 766 F.2d at 161. Combined with a broad reading of animus—defined as a “person’s basic attitude or intention”—any subgroup of a generally protected class, regardless of its limit or description can now obtain Section 1985(3) relief, even though a conspiracy may only tangentially affect them. Section 1985(3) is thus transformed into the “general federal tort law” this Court warned against in *Scott*, 463 U.S. at 834.

Judge A. Wallace Tashima has cogently explained why this same class of “women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act.”³²

The Court disagrees with the proposition that any “particular [sub]class of women,” *id.*, is a protected class.

29 *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983).

30 *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

31 *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983).

32 *National Abortion Federation v. Operation Rescue*, 721 F.Supp. 1168, 1170 (C.D. Cal. 1989).

For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry, thus, must be made without respect to gender, i.e., it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the . . . [Section 1985(3)] analysis.*³³ (Emphasis added).

This "abortion seeker" rationale reflects the factual reality of Operation Rescue demonstrations. The general class of women the Second Circuit attempted to create had no relationship to the Petitioners' actions and should be rejected by this Court.

As this Court has held:

[T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.³⁴

Petitioners respectfully urge this Court to define the parameters of "animus." Is it merely "a person's basic attitude or intention,"³⁵ or is it "ill-will" or "a prejudice against a group of persons or against a particular person because of his membership in that group"?³⁶ And should not "the class

33 721 F.Supp. at 1171. In footnote 4 to this section, Judge Tashima notes the illogical extension of this argument. If women are a protected class, then all subclasses of women are protected. Likewise, if men are an unprotected class, then all subclasses of men are unprotected. "Therefore, e.g., a class of homosexual women would be protected, but a class of homosexual men would not be." *Id.* at 1171 n.4.

34 *Griffin v. Breckenridge*, *supra*, 403 U.S. at 102.

35 *N.Y. State Nat. Organization for Women v. Terry*, *supra*, (A-42).

36 *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir. 1987).

animus alleged be consistent with the deprivation of rights alleged."³⁷ The Petitioners submit that the animus or motivation of the conspiracy, *i.e.*, "those at whom the conspiracy was aimed" is the proper interpretation.³⁸

In this case not only is the class of "women seeking abortions" inappropriate, but the alleged "animus" against them is wholesale fiction. Truth has come full circle where peaceful non-violent pro-life demonstrators, many of whom are praying for abortion seekers, are charged with animus against women similar to the Ku Klux Klan's hatred of Blacks and their supporters. Not only is the parallel wholly lacking, the application of the Ku Klux Klan Act against them is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in abortion litigation in the Post-*Webster* era in a manner that was not intended by Congress.³⁹

II. The Second Circuit Erroneously Held That Brief Non-Violent Sit-In Demonstrations on Public Sidewalks Implicate The Right to Travel.

Relying on a holding from *Doe v. Bolton*, 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause, together with a reference to the right against private discrimination created by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971), the Second Circuit concluded that the Petitioners' sit-in demonstrations on public sidewalks have denied the Respondents' constitutional Right to Travel (A-43 to 44).

As a threshold matter, there is no Right to Travel case factually analogous to Rescue demonstrations of the type involved in this case. Such decisions involve infringement of the Right to Travel by state action, principally through dis-

37 *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

38 *Mississippi Womens' Medical Center v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

39 *Webster v. Reproductive Health Services*, 492 U.S. _____, 106 L.Ed.2d 410 (1989).

crimutory residency requirements.⁴⁰ The Right to Travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing Rescue demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."⁴¹

In the present case, Respondents did not draw any evidence of denial of the Right to Travel to any specific identifiable women. The case rests solely on the *generalized* allegation of *possible* impacts on some women who *may* perceive some difficulty in obtaining an abortion in another jurisdiction. Furthermore, it is clear that out-of-state abortion seekers are treated no differently than those in the State of New York.

Under the decision of the Second Circuit, even if the constitutional right to an abortion is reversed, Section 1985(3) and the Right to Travel will become the vehicle not only for a continuing onslaught of future abortion litigation but for use against every other minority movement that espouses unpopular positions. The federal courts will be even further embroiled, this time as "the monitors of . . . [anti-abortion demonstration] tactics" rather than "campaign tactics," the very situation this Court wisely avoided seven years ago.⁴²

40 See e.g., *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopes*, 476 U.S. 898 (1986).

41 *National Abortion Federation v. Operation Rescue*, No. CV 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

42 *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, *supra* 463 U.S. at 836 (emphasis added). This Court was so clear in *Griffin* that the Ku Klux Klan Act was never "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, *supra* 403 U.S. at 101. *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, *supra*, 463 U.S. at 834.

The contention that non-violent sit-in demonstrations on public sidewalks involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional ambrosia—the creation of a Federal cause of action where none exists.

III. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

On October 27, 1988, the district court held the Petitioner Randall Terry and Operation Rescue in contempt, ruling on motion papers and denying the Petitioners' request for a hearing or even an oral argument (A-78 to 103). The Petitioners submit that the unconditional imposition of the \$50,000 (\$25,000/day, originally payable to Respondent N.O.W. and modified by the panel to be payable to the United States) and \$19,141 (payable to the City of New York for police overtime for failure to give 12 hours advance notice of the exact location of the demonstration) fines made the contempts criminal in nature, since there was no purge mechanism available to the Petitioners to comply with and escape the sanctions (A-104 to 108).

The panel reasoned that since the district court added the \$25,000 sanction to its injunction *before* the Petitioners violated the TRO, the Petitioners' opportunity to comply necessarily came at that initial point (A-22 to 23). This rationale cannot be reconciled with the settled contempt jurisprudence of this Court. A recent decision of this Court summarized a century's worth of this Court's settled contempt jurisprudence:

If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the petitioner can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been

afforded the protections that the Constitution requires of such criminal proceedings, . . . An unconstitutional penalty is criminal in nature because it is "solely and exclusively punitive in character." *Penfield Co. v. SEC*, 300 U.S. 585, 593, 67 S.Ct. 918, 922 91 L.Ed. 1117 (1947). * * * This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment *but could not be made to pay 'a flat, unconditional fine of \$50.00.'* *Penfield, supra*.

Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 632-33 (1988) (citations omitted) (emphasis added). The unconditional and punitive nature of the \$50,000 and \$19,141 fines are manifest.

The fact that the lower courts have conveniently denominated their penalty "civil coercive contempt" (A-22 to 23) is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock, supra*, 485 U.S. at 631. The unconditional character of the court's contempt orders made the contempt criminal. Since none of the due process protections, required in criminal proceedings, were afforded Petitioners Randall Terry and Operation Rescue, the contempt judgments must be reversed. *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

In the decision below, the Second Circuit stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." (A-21) This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.⁴³

⁴³ *Penfield v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional \$50.00 fine was a criminal sanction); *Union Tool v. Wilson*, 259 U.S. 107, 110 (1922), (a \$2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock, supra*.

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. See, *Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock*, *supra*; *Penfield v. Securities & Exchange Commission*, *supra*. On December 9, 1988 and November 3, 1988, when unconditional contempt judgments and fines against the Petitioners were entered, there was nothing the Petitioners could have done to purge themselves of the contempt (A-104-105, 107-108). The judgments were, therefore, *ipso facto*, criminal in nature.

The criminal nature of the contempt judgments is revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range*, 221 U.S. 418, 441 (1911). The Second Circuit's decision is replete with pejorative references to the Petitioners' purported defiance (A-21 to 26). The fact that the Second Circuit modified the November 3, 1988 \$50,000 Judgment to be payable to the court (the United States) and not to the private Respondent N.O.W., makes the judgment more clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"⁴⁴ and "to punish the act of disobedience as a public wrong."⁴⁵

The Second Circuit's holding that the petitioners' opportunity to comply with the order came *before* a violation occurred only manifests, in a *tour de force* manner, the pejorative comments of Justice O'Connor in *Thornburgh*, *supra*. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed *with conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

44 *Nye*, *supra*, 313 U.S. at 42. See Second Circuit discussion at A-51 (public health and safety at risk).

45 *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.⁴⁶

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,⁴⁷ as well as other Second Circuit decisions.⁴⁸ Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh*, *supra* 476 U.S. at 812 (White, J., dissenting).

IV. The Petitioners Have Been Denied A Fair Trial on Constitutional Issues

The preemptive summary judgment upheld by the Second Circuit has denied the Petitioners an opportunity for a complete hearing with discovery on the complex factual and constitutional issues in this case, dealing with the Right to Travel, the First Amendment, the defense of "necessity" to protect human life, and the right to privacy-abortion. Other than a limited hearing with regard to issuance of a preliminary injunction, held on October 25 and 27, 1988, the trial court has effectively denied the Petitioners a full evidentiary hearing on the permanent injunction, and has tried the case and rendered judgment in favor of the Respondents on the basis of mere affidavits presented by Respondents' employees, which are flawed by hearsay and legal conclusions (A-192 to 203). Because genuine issues of material fact remain

46 See also, *Crozer-Chester Medical Center v. Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

47 *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir. 1980); *In re: Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff v. Miller*, 702 F.2d 770 (9th Cir. 1983).

48 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo v. United States*, 485 U.S. 1039 (1988) (stating a \$50,000 fine was clearly criminal contempt); *U.S. v. Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

unresolved, the district court's action, as affirmed by the circuit court, therefore, *conflicts* with existing authority and decisions of this Court.

In its summary judgment decision, the district court noted the Petitioners were not entitled to further discovery because they had "presented no evidence in their papers opposing summary judgment that would bring into question the undisputed facts on the record." (A-137 n.17) This reasoning is inexplicably narrow, in view of the fact that at the hearing of October 25 and 27, the Petitioners—despite their strenuous objection—were required by the court to put their witness and evidence on *first*, in response to the bare allegations contained in Respondents' supporting affidavits. (A-281 to 285) Petitioners' witnesses, point by point, refuted the Respondents' affidavits at that hearing (Dr. Bernard Nathanson (medical) at A-204 to 225 and Dr. Stephanie O'Callaghan (psychological and emotional) at 237 to 250). In spite of this clear factual conflict, the lower court has refused the Petitioners a reasonable opportunity to conduct discovery. *See*, Respondents' Complaint at ¶ 42 (A-164); Petitioners' Answers at ¶ 42 and ¶ 63 (A-180, 182, 188, 190).

Constitutional questions and issues of public importance should be decided only with a properly developed factual predicate, and "where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied." 6(2) J. Moore, *Moore's Federal Practice* Sec. 56.17(10) (1988). *See, Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982). In *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), involving questions as to motive and intent, this Court said that "[t]rial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice.' " *White Motor Company v. United States*, 372 U.S. 253, 259 (1963). *See also, Motown Record Corp. v. Mary Jane Girls, Inc.*, 118 F.R.D. 35, 37 (S.D.N.Y. 1987).⁴⁹

49 In *Donahue v. Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54, 58 (2d Cir. 1987), dealing with a 42 U.S.C. Sec. 1983 action involving alleged Freedom of Speech violations, Judge Kaufman, speaking for the panel,

Petitioners' intent in conducting the demonstrations in this case has been to protest abortion, to defend unborn human life and to advise and protect mothers concerning the immediate and long term consequences of abortion. This intent was directly at issue below—indeed, a finding of class-based animus was critical to upholding federal jurisdiction over Respondents' claims. *N.Y. State Nat. Organization for Women v. Terry* (A-41 to 43). The Petitioners, however, have been denied a full hearing in contravention of the holding in *Poller, supra*, and following cases.

The Petitioners' threshold evidence presented at the preliminary hearing on October 25 and 27, 1988, in the testimony of Dr. Nathanson and Dr. O'Callaghan, (A-204 to 250) refuted in detail the claims of the Respondents' supporting affidavits regarding endangerment of the mothers' health and demonstrated that "genuine issue(s) of material fact" remained for discovery and trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Despite the existence of disputed issues of "material fact," the district court entered summary judgment in favor of the Respondents. This is impermissible, for as this Court has recently stated: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).⁵⁰

noted that summary judgment must "be used selectively to avoid trial by affidavit." (citing *Judge v. City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975). See also, *City of Los Angeles v. Preferred Communications*, 476 U.S. 480 (1986) (reversing a dismissal because of inadequate record for First Amendment claims).

50 Similarly, the Second Circuit has observed that upon motion for summary judgment, a court "'cannot try issues of fact; it can only determine whether there are issues to be tried.'" *Donahue v. Windsor Locks Bd. of Fire Com'rs.*, 834 at 58. "When the Court considers a summary judgment motion, it must draw all reasonable inferences and resolve all ambiguities in favor of the non-moving party." *Garza v. Marine Transport Lines, Inc.*, 871 F.2d 23, 26 (2d Cir. 1988); *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988).

Equally important, the district court has prematurely decided "serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Thornburgh v. American Coll. of Obst. and Gyn.*, 476 U.S. 747, 815. (O'Connor, J., dissenting). The Petitioners have been summarily denied the opportunity to properly and fully present their case and, in particular to refute the Respondents' generalized and unsupported claims that the right to abortion is unduly burdened, or that the Right to Travel is abridged, let alone adversely affected, by Petitioners' Rescue activities.

The constitutional and factual questions of this case deserve a full trial and scrutiny under the discovery process. To do otherwise, would deny the Petitioners a fair adjudication, establishing a pattern of truncated, *pro forma* summary judgments for a "special" class of cases in which abortion is challenged as a matter of fact or law.

V. Petitioners' First Amendment Rights Have Been Violated By Court Orders That Imposed Unlawful Prior Restraint of Protected Speech

Petitioners' practice of non-violent sit-ins and protests is aimed at temporarily closing the entrance of abortion centers and passively demonstrating, including displaying placards, wearing armbands, counseling, persuading, singing and praying.

Operation Rescue volunteers, as a matter of conscience and deeply held personal conviction, seek to directly save the life of unborn children scheduled for abortion and to turn the heart of the nation, its legislators and jurists away from the practice of abortion on demand, through legislation and legal decisions. (A-256 to 280)

Operation Rescue specifically directs its participants in writing that all demonstrations will be peaceful and passive in nature, and requires each demonstrator to sign a pledge of non-violence. (A-257 to 258, 270 to 271) Rescues conducted in the New York City area have in fact been non-violent and peaceful.

Although under existing Supreme Court decisions, the non-violent activity of temporarily blocking entry to an abortion center is not of itself protected by the First Amendment, *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965), the peaceful presence of demonstrators, the display of placards, and other demonstration activities such as singing, prayer, counseling and vocal persuasion, fall directly within the ambit of activity historically protected by the First Amendment. *E.g.*, *Hague v. CIO*, 307 U.S. 496 (1939); *United States v. Grace*, 461 U.S. 171 (1983); *Edwards v. South Carolina*, 372 U.S. 229 (1963). The question which arises in this case is: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever? The reach of constitutional constraints, *if any*, on court or police action in regard to demonstrations such as Operation Rescue which include expressive conduct and non-violent acts of civil disobedience, will turn on this issue.

A. Coercive Fines, Content Discrimination And Prior Restraint

In proceedings below, the district court has issued injunctions and penalties, striking at the political content of Petitioners' message, chilling the First Amendment arena with broad restraints, buttressed by huge fines. On May 4, 1988, attorneys for Respondents and Petitioners herein appeared before the Honorable Robert J. Ward, U.S.D.J. Southern District of New York, to argue a show cause for violation of a TRO against Petitioners' sit-in demonstrations at New York City abortion clinics (during the period of May 1-6, 1988) originally entered by the Supreme Court of the State of New York on April 28, 1988. Without hearing evidence of irreparable harm, Judge Ward adopted the Temporary Restraining Order issued against Petitioners by the New York State Court, and additionally modified it by adding a prospective \$25,000 per day fine for violation of the TRO provisions,

together with costs expended by the City of New York for police presence at the demonstrations. (A-53 to 55)

In discussing disposition of a potential coercive fine imposed for violation of the TRO, Judge Ward, *without* request from the Respondents, indicated that he was planning ultimately to have the fine paid to the Respondents. The following exchange of remarks occurred:

MR. COLE: [for the Respondents] "Well no, it is for the purpose of coercing compliance. If \$25,000 doesn't work, then it is appropriate to increase the penalty. However, my understanding is that that penalty goes to the Court, not to Respondents."

THE COURT: "Oh, no. The way I understand this business of coercion is that I can direct the penalty to be paid in any way I deem appropriate. Partly, I would suggest, I would be considering that the penalty be paid in such a way as to encourage compliance. I think if I may say so, the most effective way to do that would be to direct that the payments be made to the Respondent or Respondents. I don't think that is something that the petitioners would be happy with, but *I would certainly suggest that if I were made to pay someone who I considered my—, I won't say enemy, I won't say that—a person who has a different point of view who might then use the money to buy advertising space and do other things to counter-attack my attack, I think the whole thing might turn into a rather interesting political exercise. But that is for another day.* (emphasis added)

By court opinion dated October 27, 1988, Judge Ward found Petitioners Randall Terry and Operation Rescue to be in Civil Contempt of the Court's May 5th Order for demonstrations held on May 5th and 6th, 1988 and assessed a penalty of \$50,000, which was ordered to be "paid to plaintiff National Organization of Women and disbursed among the remaining respondents according to its discretion." (A-104)⁵¹

⁵¹ The district court additionally found Petitioners Terry and Operation Rescue liable to pay City of New York excess police costs, and subsequently ordered \$19,141 to be paid by Petitioners. (A-106 to 108)

In the first instance, as subsequently held by the circuit court on appeal in this case, the district court had no authority to order coercive penalties to be paid to the Respondents. (A-27 to 29). The penalties in this case were unequivocally identified as "coercive". More importantly, the Judge's remarks on May 4th reveal with astounding clarity the court's intention to punish and coerce the Petitioners by making money available to Respondents *for the express purpose of opposing and "counterattacking" Petitioners' political beliefs*. No case, no principle of law, can support an implicitly intentional court use of the system of justice to undermine or resist the Petitioners' First Amendment cause, in order to coerce behavior. Cases regarding impermissible government discrimination against the content of First Amendment speech activity underscore this tenet.⁵²

It is particularly egregious that in providing \$25,000 daily fines, the court made no substantial inquiry into the financial ability of the *individual Operation Rescue participants* to pay such fines, although the court's order and threatened fines applied to every participant with actual notice. In *Dole Fresh Fruit Co. v. United Banana Co., Inc.*, 821 F.2d 106, 110 (2d Cir. 1987), the Second Circuit held that before imposing coercive penalties a trial court must explicitly consider (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and consequent seriousness of the burden of the sanction upon him."⁵³ In this case the court was advised that counsel believed that Petitioner Terry was essentially without funds.

But, the district court, without considering this or evaluating the other applicable standards, insisted upon levying a severe coercive penalty that ignored *the chilling effect of the*

52 *Police Department v. Mosley*, 408 U.S. 92 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

53 *But see, United States v. Ruggiero*, 835 F.2d 443 (2d Cir. 1987) (defense attorney's silence in regard to petitioner's financial resources).

generally publicized \$25,000 daily fine upon certain clearly protected First Amendment demonstration activities.⁵⁴

Although Respondents *disingenuously* urged, and the district court went on to hold, that the highly trained and experienced New York Police Department could not cope with the Rescue demonstrations (thereby justifying the imposition of \$25,000 penalties on demonstrators), the record is clear that New York Police Department, after viewing videotapes of similar Rescue sit-ins, had advised a New York State court that they were quite able to handle such demonstrations.⁵⁵

In *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 180-181 (1968), where an *ex parte* restraining order had been issued by a state court, prohibiting further rallies of a

54 In the contempt opinion of October 27th herein, the district court recited the requirements of *Dole Fresh Fruit Co.*, *supra*, but failed however, to give specific consideration to part (1) or (2) thereof and only briefly referred to the TRO Hearing of May 4th in regard to part (3). At a further hearing conducted on May 6, 1988, Judge Ward stated: "I was well aware that the TRO was not likely to stop a group as committed as this one. Indeed, it did not. So I used what I thought was reasonable judgment." The implication of these facts in regard to part (2) of the *Dole Fresh Fruit Co.*, *supra*, requirements and in light of potential criminal charges clearly facing demonstrators for obstructing entrance to abortion clinics, point to an excessive, ineffective penalty, punishing Rescue participants acting as a matter of conscience to protest abortion and save human life. Judge Ward's tacit solicitation from Respondents that jail penalties should not be imposed, to avoid creating "martyrs," points directly to the Court's not insignificant concern with First Amendment implications of Petitioners' demonstrations, rather than applying a reasonable penalty to coerce behavior.

55 When considering a similar case where a TRO was being sought against Operation Rescue demonstrations planned in the Boston area, the United States Court of Appeals for the First Circuit *denied* the appeal of a lower court ruling against granting a preliminary injunction, indicating that the Massachusetts authorities and police could be expected to properly safeguard the rights of the Appellants and their patients. Upon a renewed motion for a temporary restraining order, after Operation Rescue demonstrations in Boston, the district court in this case again refused the requested injunction. *Planned Parenthood v. Operation Rescue*, Civil Action No. 88-2329-NA (D.Mass. October 19, 1988); *Planned Parenthood v. Operation Rescue*, Appeal No. 88-2047 (1st Cir. October 21, 1988); *Planned Parenthood v. Operation Rescue*, Civil Action No. 88-2329-MA (D.Mass. October 26, 1988).

“white supremacist” organization, the Supreme Court observed that:

Ordinarily the states’ constitutionally permissible interests are adequately served by *criminal penalties* imposed *after* freedom to speak has been so grossly abused that its immunity is breached. *The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint.* (Emphasis added.)

The lower courts herein had a more than reasonable basis to allow New York City authorities to enforce the law and seek criminal penalties as necessary with regard to Rescue demonstrations—as the First Circuit has decisively chosen to do. Instead, they departed from the presumption protecting political protest and the exercise of the First Amendment and imposed a severe regime of prior restraint that impermissibly chilled political protest. *The inevitable effect of the \$25,000 daily fines has been reinforced by the district court’s recent imposition of a total of \$450,000 in new fines against 10 individuals for injunction violations, including \$100,000 additional fines against Randall Terry and Operation Rescue. N.Y. State Nat. Organization for Women v. Terry*, No. 88 Civ. 3071, slip op. at 53-54 (S.D.N.Y. Feb. 27, 1990).

Reporting on implications of the court’s decision, the New York Times noted that, “Lawyers for the National Organization for Women, as well as some of the protestors, said that potential demonstrators might be deterred from participating in demonstrations because they could be held personally liable,” “‘It’s a warning to individuals,’” said Mary G. Gundrum, an attorney at the Center for Constitutional Rights who represented N.O.W. and several clinics . . . “*Individuals are now put on notice that if they choose to participate, they will be personally liable.*”” *The New York Times*, Feb. 28, 1990, B1, col. 5. (emphasis added)

In *Spallone v. United States*, ____ U.S. ____ 58 U.S.L.W. 4103, 4105 (1990), this Court stated the ancient maxim in regard to coercive sanctions that “a court must exercise [t]he *least possible power* adequate to the end proposed.” Quoting *Anderson v. Dunn*, 6 WHEAT (19 U.S.) 204, 231 (1821). “[A]

district Court, in exercising the awesome power of contempt, must turn square corners." *United States v. Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). "When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

In *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 390 (1973), dealing with prior restraint of advertisement, the Court characterized the effect of such conduct, stating that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by *inducing excessive caution in the speaker* before an adequate determination that it is unprotected by the First Amendment." (emphasis added) See also, *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

In this regard, the enormously disproportionate fines employed by the lower court herein are on their face and as applied, unconstitutional, bearing no reasonable relationship to the meager, unsubstantiated evidence of alleged harm, in the face of broad First Amendment implications of Rescue demonstrations.

B. The *O'Brien* Standard and *Spence v. Washington*

In *United States v. O'Brien*, 391 U.S. 367, 376 (1968), it was said: "This Court has held that when 'speech' and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court continued, explaining its reasoning:

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] *if the governmental interest is unrelated to the suppression of free expression*; [4] *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest*. 391 U.S. at 377. (emphasis added).

In light of the trial court's express and implied intention regarding the political content of Petitioners' First Amendment activities, and the plainly excess, unjustified nature of fines imposed against Petitioners, it is evident that the court's actions fail the latter two requirements set forth in *O'Brien*.

The Supreme Court has further held:

"In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.' "

Texas v. Johnson, 491 U.S. ___, 109 S.Ct. 2533, 2539 (1989), quoting *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).

Rescue demonstrations only temporarily block entrance to abortion clinics and cannot in their own right save the lives of more than a few unborn children. (A-256 to 280) *The "expressive" component of these demonstrations is nevertheless great.* They include picketing, posters, singing, counseling and prayer, as well as a cumulative message to the world that the evil of abortion should be arrested. The question arises: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes, be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

The Petitioners respectfully submit that minimal protections under the First, Fifth and Fourteenth Amendments require an articulable standard of reasonableness in measuring sanctions against individuals who participate in Rescue demonstrations, particularly in light of the availability of state criminal enforcement and civil damages. Before assessing sanctions in dealing with public demonstrations containing elements of civil disobedience for political purposes, the court should give explicit consideration to the following suggested criteria:

- * The character and extent of expressive conduct falling within First Amendment protection

- * The probable impact of sanctions on First Amendment demonstration activity
- * The probable effectiveness of suggested sanctions in bringing about compliance which cannot be achieved by normal criminal sanctions and civil remedies.

See also, *United States v. O'Brien*, *supra*, 391 U.S. at 376; *Dole Fresh Fruit Co. v. United Banana Co., Inc.*, *supra* at 110.

VI. The Second Circuit Erred In Conferring Article III Standing on the Respondents and Respondent-Intervenor

The Petitioners have asserted, from inception, that the Respondents have no Article III standing to maintain this action, nor seek the class-wide injunctive relief that they have been granted, as the Respondents have utterly failed to plead or produce evidence of Article III direct injury. *Los Angeles v. Lyons*, 461 U.S. 95, 102-103 (1983). See, *Roe v. Operation Rescue*, No. 88-5157, slip. op. (E.D. Pa., December 19, 1988). The respondents fail to meet the required standards for organizational or representative standing, as the claim asserted "requires the participation of individual members in the lawsuit," and the necessary proof can not be presented "in a group context." *New York State Club Association v. City of New York*, 487 U.S. 1, ____ n.4 (1988).

The complaint filed by the City does not contain the requisite allegations of a "personal stake" in the outcome of the litigation. See, *City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) ("Unless the City has alleged an injury to itself, it can establish standing only as a representative of its citizens who have been injured in fact.") See also, *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976). In the absence of standing, the City had no right to invoke the district court's remedial powers and its purported pendant party claim should have been dismissed.⁵⁶ *Finley v. United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989).

⁵⁶ See, *Prince George's County, Maryland v. Levi*, 79 F.R.D. 1, 5 (D.Md. 1977); *Commonwealth of Pa. ex. rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D. Pa. 1973).

VII. The Second Circuit's Awards of Cost Under Rule 37(A)(4) Jointly And Severally Against Petitioners And Their Counsel Was Arbitrary And An Abuse Of Discretion

As the district court recited in its August 31, 1988, Order, the discovery sought by Respondents and by intervenor City of New York from Petitioners Terry and "Operation Rescue" was "in connection with their then pending contempt motion" (A-57). The discovery on its face seriously implicated Mr. Terry's Rights to Freedom of Speech, Freedom of Association, Freedom of Religion and Personal Privacy, guaranteed by the First, Fourth and Fourteenth Amendments, and his Privilege Against Self-Incrimination, guaranteed by the Fifth Amendment. Petitioners opposed Respondents' motion to compel and sought a protective order in order to preserve Mr. Terry's constitutional Rights and Privileges and to permit Petitioners to obtain a ruling on whether the Court had Article III jurisdiction before subjecting Mr. Terry, who was not sued as a party in his personal capacity, to merits discovery. Petitioners also sought to prevent respondents from using the fruits of such discovery in other actions they had brought or threatened to bring against petitioners.

The district court declined to follow this Court's decision in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) and summarily rejected Petitioners' request for a protective order. The court also impermissibly narrowed the constitutional protections afforded to citizens engaged in non-violent civil disobedience and public advocacy of unpopular but deeply held religious, political and moral convictions and penalized Petitioners for their attempt to assert their constitutional Rights and Privileges. Finally, the court arbitrarily imposed sanctions upon attorneys engaged in *pro bono* representation of such dissenters, thereby threatening to discourage members of the federal bar from fulfilling their professional ethical obligation to provide vigorous and fearless defense to citizens who espouse unpopular causes and seek by their protests to chal-

lenge the failure of government to remedy what they believe to be a pernicious and inhuman injustice.

The district court's imposition of costs was particularly inappropriate here because it was imposed jointly and severally on Petitioners *and their counsel*. The district court's rationale affirmed by the Second Circuit, for this extraordinary discovery sanction is that "Terry invoked privileges almost entirely on advice from his counsel." (A-36). According to Professor Moore,

"expenses should be charged to the attorney only if the failure to make discovery was principally at his instigation." 4A J. Moore, *Federal Practice* ¶ 37.02 [10.-4] (2d ed. 1988).⁵⁷

As the court of appeals noted in *Weisberg v. Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984), even where the imposition of costs under Fed.R.Civ.P. 37(a)(4) on a party may be justified, it does not automatically follow that it is proper to impose costs on that party's attorney. Rather, specific findings of *separate grounds* are required to sustain the imposition of costs on the attorney:

"This requirement of findings to support an award of expenses against an attorney is prompted by the structure of Rule 37, by concerns for effective appellate review, and by concerns for the tension created in the attorney-client relationship when the attorney is subject to personal liability."

Id. at 874.⁵⁸

57 See also, *Crawford v. American Federation of Government Employees*, 576 F.Supp. 812, 815 (D.D.C. 1983) ("an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation"); *Humphreys Exterminating Co. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974); *Hulvat v. Royal Indemnity Co.*, 277 F.Supp. 769, 771 (E.D. Wis. 1967).

58 See also, *Reygo Pacific Corp. v. Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982); *Stillman v. Edmund Scientific Co.*, 522 F.2d 798, 801 (4th Cir. 1975); 1970 Advisory Committee Note to Rule 37(a)(4), quoted in 4A J. Moore, *Federal Practice* ¶ 37.01 [8], pp. 37-22 to 23 (2d ed. 1988).

Moreover, where there is a legitimate dispute as to the propriety of discovery with First and Fifth Amendment implications, effective representation by counsel requires that discovery disputes be brought to the court for resolution and opposition to a motion to compel in those circumstances should be presumed to be substantially justified. *See, Pierce v. Underwood*, 487 U.S. 552 (1988). Therefore, imposition of costs on petitioners *and their counsel* here was an unwarranted abuse of discretion. *See, e.g., Spevack v. Klein*, 385 U.S. 511 (1967) (prohibiting "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ")

CONCLUSION

It is respectfully submitted that Petitioners' petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: March 5, 1990

New York, New York

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE,
THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 906, 907, 908, 978, 979—August Term 1988
(Argued March 6, 1989 Decided September 20, 1989)
Docket Nos. 88-7873, 88-7915, 88-7969, 88-9103, 89-7121

NEW YORK STATE NATIONAL ORGANIZATION FOR
WOMEN; NEW YORK CITY CHAPTER OF THE
NATIONAL ORGANIZATION FOR WOMEN; NATIONAL
ORGANIZATION FOR WOMEN; RELIGIOUS COALI-
TION FOR ABORTION RIGHTS—NEW YORK METRO-
POLITAN AREA; NEW YORK STATE NATIONAL
ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PAR-
ENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD
CLINIC (BROOKLYN); PLANNED PARENTHOOD MAR-
GARET SANGER CLINIC (MANHATTAN); OB-GYN
PAVILION; THE CENTER FOR REPRODUCTIVE AND
SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL
BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE
(NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD;
REVEREND BEATRICE BLAIR; RABBI DENNIS
MATH; REVEREND DONALD MORLAN; PRO CHOICE
COALITION,

Plaintiffs-Appellees,

CITY OF NEW YORK,

Plaintiff-Intervenor-Appellee,

—v.—

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE
DOES,

Defendants-Appellants.

Before:

CARDAMONE and PRATT, *Circuit Judges*
and LASKER, *District Judge**

Operation Rescue, et al., appeal from a judgment of the United States District Court for the Southern District of New York (Ward, J.) entered on January 10, 1989 that denied appellants' motion to dismiss plaintiff New York State National Organization for Women's and plaintiff-intervenor New York City's complaints, and granted plaintiffs' motions for summary judgment on their claims asserted pursuant to 42 U.S.C. § 1985(3) (1982) and pending state law claims. Appellants also appeal from the issuance of a permanent injunction restricting their attempts to block ingress and egress from abortion clinics in the New York Metropolitan area.

Modified, and as modified, affirmed.

* Hon. Morris E. Lasker, United States District Court Judge, Southern District of New York, sitting by designation.

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DAVID D. COLE, New York, New York (Mary M. Gundrum, Rhonda Copelon, Center for Constitutional Rights, New York, New York; Alison Wetherfield, Sarah Burns (D.C. Bar only), NOW Legal Defense & Education Fund, New York, New York; Judith Levin, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, of counsel), *for Plaintiffs-Appellees*.

KRISTIN M. HELMERS, New York, New York, Office of the Corporation Counsel, City of New York, *for Plaintiff-Intervenor-Appellee*.

CARDAMONE, *Circuit Judge*:

The principal question presented on this appeal is whether the First Amendment grants Operation Rescue (appellants) the right to engage in activities designed to deny access to abortion clinics to women seeking the services they provide. We must determine if the limitations placed by the district court on appellants' actions and speech square with the constitutional rights guaranteed all citizens under the First Amendment. We think they do.

Insofar as appellants' attempts to block ingress and egress to plaintiffs' clinics resulted in Operation Rescue demonstrators' physical presence on the clinics' premises, they were trespassers without right, constitutional or otherwise, to be there. Insofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to tortiously assault or harass them, appellants' rights ended where those women's rights began. There is no constitutional privilege to assault or harass an individual or to invade another's personal space. Hence, the tortious interference with the constitutional rights of those entering or leaving the clinics subjects appellants' First Amendment rights to the limitations contained in the injunction that is the subject of this appeal.

Defendants Randall Terry and Operation Rescue appeal from a judgment of the United States District Court for the Southern District of New York (Ward, J.) entered on January 10, 1989, which denied defendants' motion to dismiss; granted plaintiff New York State National Organization for Women's (N.O.W.) and plaintiff-intervenor City of New York's (City) motions for summary judgment on their claims under 42 U.S.C. § 1985(3) (1982) and the New York common law of trespass and public nuisance, respectively; and permanently enjoined defendants from impeding or obstructing ingress into and egress from medical facilities during anti-abortion demonstrations.

Appellants challenge the constitutionality of a series of injunctions issued during the course of this litigation, as well as the substantive grounds upon which the permanent injunction is based. *See New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (decision on the merits resulting in permanent injunction);

New York Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) (contempt order of October 27, 1988). For the reasons that follow the district court's judgment is modified, leaving in place the permanent injunction, and as modified, it is affirmed.

BACKGROUND

I State Court Proceedings

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988 seeking declaratory and injunctive relief to restrain Operation Rescue from blocking access to medical facilities providing abortions. The complaint alleged eight separate causes of action: violations of New York City Rights Law § 40(c) and New York Executive Law § 296; public nuisance; interference with the business of medical facilities; trespass; infliction of emotional harm on patients and employees of medical facilities; tortious harassment of patients and employees of medical facilities; false imprisonment of patients and employees of medical facilities; and conspiracy to deny women seeking abortion or family planning services the equal protection of the laws and equal privileges and immunities, in violation of 42 U.S.C. § 1985(3).

On April 28, 1988 a temporary restraining order (TRO) that did not expressly enjoin Operation Rescue from blocking access to health care facilities was issued in New York state court. On May 2, 1988, as a result of a demonstration outside a Manhattan abortion clinic, a second TRO was issued that enjoined Operation Rescue from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester

Counties from May 2, 1988 to May 7, 1988." See 697 F. Supp. 1324, 1327 n.3 (S.D.N.Y. 1988). On May 3, 1988 Operation Rescue held a demonstration in Queens outside another abortion clinic at which several hundred participants were arrested. At a hearing held in state court, the City's application to intervene was granted. Defendants then successfully petitioned to remove the suit to federal district court based upon the claim asserted pursuant to 42 U.S.C. § 1985(3).

II District Court Proceedings

A. The May 4 TRO and Contempt Proceedings

On May 4, 1988 Southern District Judge Ward continued the state court's TRO, but modified it substantially in light of the events of the previous day. In addition to the prohibitions on obstructing ingress and egress, the district court added coercive sanctions of \$25,000 for each day that defendants violated the TRO, and required defendants to give advance notification to the City of the location of any planned demonstration. Judge Ward also ruled that failure to give such advance notice would make Operation Rescue liable for excess costs incurred by the City. The district court, as had the state court, granted the City's motion to intervene. Defendants moved on May 5 to vacate the TRO issued the day before for plaintiffs' alleged failure to comply with Fed. R. Civ. P. 65(c). The district court denied the motion on May 6, and we denied defendants' application to stay the TRO pending an expedited appeal.

Operation Rescue demonstrated in Hicksville, New York and in Manhattan, on the mornings of May 5 and May 6, respectively. It is undisputed that its leader, defen-

dant Randall Terry, was aware of the TRO but did not alter his written instructions to demonstrators to continue to obstruct access to the abortion clinic. New York City police also read the TRO twice over a megaphone to demonstrators during the May 6 blockade. When the demonstrators failed to comply, 320 of them were arrested.

On May 31, 1988 plaintiffs sought civil contempt sanctions against defendants pursuant to Fed. R. Civ. P. 70 and 18 U.S.C. § 401 (1982) as a consequence of the events of May 5th and 6th. The district judge granted the motion and denied defendants' cross-motion to dismiss. In a judgment entered November 4, 1988 defendants Operation Rescue and Terry were held jointly and severally liable for \$50,000 in civil contempt sanctions to be paid to plaintiff N.O.W., *see* 697 F. Supp. at 1329, and in a judgment dated September 9, 1988 for \$19,141 to be paid to the City for its costs that resulted from defendants' failure to give advance notice of either demonstration. In so holding, the court rejected Operation Rescue's contentions that the various plaintiffs and plaintiff-intervenor lacked Article III standing and that the contempt proceeding was criminal in nature rather than civil. *See id.* at 1329-34, 1336-38.

B. *The October 27 Preliminary Injunction*

Meanwhile, on October 7, 1988, plaintiffs moved to modify the earlier May 2 order that had enjoined defendants from May 2 to May 7. Plaintiffs sought to broaden the injunction to include the period October 28-30, 1988 in response to Operation Rescue's plan to conduct on those dates a "National Day of Rescue." Following a hearing, the trial court on October 2 replaced its earlier TRO with an order containing the same terms as its May 4th TRO. Defendants' application for a stay of that order was

denied because counsel was unable to represent that defendants would desist from further demonstrations pending appeal. An application for a stay pending appeal was also denied in this Court. Notwithstanding the modified preliminary injunction, several hundred Operation Rescue followers conducted demonstrations at Dobbs Ferry, New York and at Deer Park in Suffolk County, New York on October 29, blocking in each instance ingress to and egress from an abortion clinic for several hours.

C. The Discovery Dispute

On May 31, 1988 plaintiffs served defendants with two notices of deposition requesting information regarding employment, assets and income pursuant to Fed. R. Civ. P. 30 and 34. Claiming privilege under the First, Fourth, Fifth and Fourteenth Amendments, defendants refused to produce any of the requested documents. Plaintiffs moved to compel discovery; defendants cross-moved for a protective order. In an opinion dated August 31, 1988 Judge Ward denied the cross-motion for a protective order, and awarded plaintiffs the fees and costs of the motion in the amount of \$16,142.75 to be paid jointly and severally by defendants and their counsel.

D. The Merits

In November 1988 plaintiffs learned that Operation Rescue had planned demonstrations in front of unspecified clinics in the New York Metropolitan area for the weekend of January 12, 1989. In a November 16 letter to Operation Rescue participants, defendant Terry acknowledged his intention to disobey the district court's contempt

order, and asked, "[w]ill we let this N.Y.C. court intimidate us back into silent cooperation with the killing [o]r will we face down this judge's order . . . ?" This threat to continue demonstrations prompted plaintiffs' December 21, 1988 motion for summary judgment and for an order permanently enjoining Operation Rescue from blockading facilities providing abortion-related services.

At the same time, defendants' motion to dismiss was pending before the district court. In that motion, defendants renewed their argument that plaintiffs and the City, as plaintiff-intervenor, lacked Article III standing and challenged the sufficiency of the plaintiffs' complaint as to each asserted cause of action. Defendants also asserted that the complaint failed to allege sufficiently grounds for a permanent injunction, and that defendants' earlier notices of appeal had divested the district court of jurisdiction. After hearing oral argument on the consolidated motions, the district judge on January 10 issued a permanent injunction that again enjoined defendants from blocking access to plaintiffs' medical facilities. The amount of sanctions was doubled to \$50,000 for each successive act in violation of the injunction.¹

1 The permanent injunction provides as follows:

UPON the undisputed facts in this case, supported by the affidavits, exhibits, and three statements of stipulated facts, the summons and complaint, and all papers and proceedings herein, and counsel for all parties have appeared and argued before the Court on January 6, 1989, it is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other local organizations and persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue participants") are:

1. permanently enjoined and restrained in any manner or by any means from:

In a January 21, 1989 opinion Judge Ward granted plaintiffs' motion for summary judgment on their com-

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- a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties;
 - b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties; Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of \$25,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED, that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order; and

Upon application of the City of New York, it is further

mon law trespass claim and on their 42 U.S.C. § 1985(3) federal cause of action. As to the latter claim, the court first held that defendants had demonstrated a discriminatory animus toward a class of women choosing abortion, *see* 704 F. Supp. at 1259, and had conspired to infringe upon such women's constitutionally protected right of interstate travel. *See id.* at 1259-60. The trial judge also considered plaintiffs' allegations that the conspiracy had threatened to deprive such women of their right to choose abortion, and ruled that their right to privacy had been violated and that there was sufficient state involvement in the violation to state a claim under § 1985(3). It further held that the City had proved all the elements of its public nuisance claim and was therefore entitled to summary judgment. *Id.* at 1261-62. Finding that plaintiffs had demonstrated success on the merits, the absence of an adequate remedy at law, and that the balance of equities tilted in plaintiffs' favor, it issued an order permanently enjoining Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion-related services. *Id.* at 1262-63.

Defendants now take this consolidated appeal from all of the foregoing judgments and orders. Because of the myriad actions taken in the trial court, we address only those issues that merit discussion.

ORDERED that in addition to the per diem amount ordered above, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue participants give the New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

DISCUSSION

The principal questions presented are discussed as follows: (1) standing, (2) jurisdiction, (3) contempt and sanctions, (4) discovery and costs, (5) summary judgment, and (6) permanent injunction.

I *Standing*

The "threshold question in every federal case" is whether a federal court has the authority to adjudicate the lawsuit. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The limitations placed on federal judicial power have a constitutional dimension, flowing from Article III, and a prudential dimension, derived principally from notions of judicial self-governance. See *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-75 (1982).

Article III requires that a party invoking the jurisdiction of a federal court show (1) that as a result of defendants' allegedly illegal conduct, it has personally suffered some actual or threatened injury, (2) which is "fairly traceable" to the challenged actions of defendants, and (3) that is likely to be redressed by grant of the requested relief. See *Allen v. Wright*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472. The prudential limitations on jurisdiction require that a plaintiff establish that he or she is the proper proponent of the rights asserted; a litigant may not raise the rights of a third-party, or assert speculative, conjectural or generalized grievances more appropriately resolved by a governmental body, other than the courts. See *Valley Forge*, 454 U.S. at 474-75. Together, these constitutional requirements and prudential concerns ensure that federal

courts adjudicate only concrete disputes in an adversarial factual and legal context. The standing of the different categories of plaintiffs is considered in light of these principles.

A. Health Care Providers

The health care clinics and abortion providers brought suit on behalf of themselves, their employees and their patients.² Their complaint alleges an imminent threat of injury to their businesses and requests wholly prospective relief—a declaration that defendants' actions are in violation of law and a permanent injunction prohibiting such actions in the future.

Defendants contend that by not producing a single woman denied access to a clinic by their activities, plaintiffs failed to establish injury in fact. *See Roe v. Operation Rescue*, No. 88-5157, slip op. at 5-7 (E.D. Pa. Dec. 20, 1988) (denying standing to physician and abortion clinics because they were not past or present targets of Operation Rescue blockades). Concededly, a plaintiff must show that "he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged conduct," one that is not conjectural or speculative. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v.*

2 These plaintiffs include: Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Bill Baird, Director of Bill Baird Institutes; Dr. Thomas J. Mullin, Medical Director of Eastern Women's Center; Reverend Beatrice Blair, Chairperson of associational plaintiff Religious Coalition for Abortion Rights (RCAR); Rabbi Dennis Math, Vice-President of RCAR; Reverend Donald Morlan, Treasurer of RCAR.

Littleton, 414 U.S. 488, 496-97 (1974) (past exposure to illegal conduct does not show present controversy; more than possibility of repeated illegal action required).

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Supreme Court held that physicians had standing to challenge a Missouri statute that excluded from Medicaid funding all abortions except those deemed "medically indicated." 428 U.S. at 108-09. The Court acknowledged that two distinct standing questions were presented: whether the physicians alleged an adequate injury in fact, and whether, as a prudential consideration, the physicians could assert not only their own rights, but also the rights of their putative patients. *Id.* at 112-13. It concluded that the physicians alleged an injury to their own rights because the challenged statute barred payment—that the doctors would otherwise have received—for all nontherapeutic abortions. *Id.* at 113. A plurality then held that the physicians could properly assert the constitutional rights of their patients, *id.* at 113-15, reasoning that the confidential nature of the relationship of doctor and patient assured the effective presentation of the patient's rights, and that practical obstacles often obstructed a woman's assertion of her own rights. *See id.* at 116-17.

The plaintiff clinics similarly assert their own right to be free of tortious acts in conducting their business activities. Each clinic at which a demonstration ultimately occurred was, as the record reveals, inoperable because entrance to and exit from the clinic buildings was completely blocked by several hundred Operation Rescue demonstrators sitting or standing in front of the building doors.

The clinics also assert the rights of their patients to travel freely to obtain abortion services. And here, too, the enjoyment of those rights is "inextricably bound up with

the activity the litigant wishes to pursue," *Singleton*, 428 U.S. at 114. Thus, we are assured that the clinics represent the rights and interests of the women seeking their assistance. See *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987). Compare *Diamond v. Charles*, 476 U.S. 54, 65-67 (1986) (denying pediatrician standing to enforce Illinois Abortion Law because injury of lost fees from aborted fetuses based on speculative independent actions of third-party patients, explicitly distinguishing *Singleton*).

Moreover, defendants' tactics add to the threatened danger that the clinics will suffer a real and immediate injury, because Operation Rescue insists on keeping secret which clinics it has targeted. Absent a known and specific target, each of the plaintiff clinics cannot help but assume that it is the one slated for a disruption of its business activities. This insistence on secrecy coupled with Operation Rescue's ability to muster quickly hundreds of participants at a chosen site necessarily broadens the scope of the threat Operation Rescue poses to all the plaintiff clinics.

We think the threat of injury is real and immediate as it relates to the rights of women seeking abortion services. Such individuals typically come to the clinics seeking first trimester abortions; second trimester abortions require more complicated procedures and, often, different facilities. Thus, women seeking first trimester abortions who are denied access by defendants may later be obliged to undergo a medically more serious second trimester abortion. One such uncontradicted case is documented in the record. Consequently, plaintiff health care providers have standing to bring this action on their own behalf and to assert the rights of their patients as well.

B. Organizations

In their complaint and throughout this litigation, plaintiff organizations have sued alleging standing as organizations *qua* organizations, and also as representatives of their membership.³ Compare *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (HOME, organization supporting equality in housing opportunities) with *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343-45 (1977) (Washington State Apple Advertising Commission, organization promoting Washington apples). The Supreme Court has held that an organization may have standing under certain conditions solely as a representative of its members, even absent an injury to itself. See *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2232 (1988); *Int'l Union, United Automobile Workers v. Brock*, 477 U.S. 274, 281-82 (1986). These conditions were crystallized in *Hunt*

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. Significantly, the Court also stated that where an organization " 'seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the

3 Associational plaintiffs include: New York State N.O.W.; New York City N.O.W.; National N.O.W.; Religious Coalition for Abortion Rights—New York Metropolitan Area (RCAR); New York State National Abortion Rights Action League, Inc.; and Planned Parenthood of New York City, Inc.

benefit of those members of the association actually injured.' ” *Id.* at 343 (quoting *Warth*, 422 U.S. at 515). *See also New York State Club Ass’n*, 108 S. Ct. at 2232 (noting that the purpose of the first *Hunt* element is “simply to weed out plaintiffs who try to bring cases . . . by manufacturing allegations of standing that lack any real foundation”); *UAW v. Brock*, 477 U.S. at 287-88 (suggesting that *Hunt*’s third element is more readily satisfied by injunctive relief than damages that require more particularized proof of injury).

These preconditions to representational standing are fully satisfied. First, the organizations consistently alleged that they “intend[ed] to help protect and guarantee women’s access to the facilities” and that as a result of Operation Rescue’s activities access was denied from April 30 to May 7, 1988 at locations throughout the New York Metropolitan area. These plaintiffs have demonstrated therefore both their legitimate associational interest and an adequate individual interest to satisfy the first *Hunt* criterion. *See UAW v. Brock*, 477 U.S. at 290 (“[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”).

Second, it is beyond question that each organization seeks to protect interests germane to its associational purpose. These plaintiffs have repeatedly alleged that they are “dedicated to assuring the constitutional right of women to choose abortion” and to ensuring unobstructed access to family planning facilities.

Third, the causes of action alleged and the relief requested do not require the participation of individual members of any organization. Plaintiffs sought and

received wholly prospective relief that will inure to the benefit of all members in New York City and the surrounding counties who seek to avail themselves of health care and family planning services. Uncontroverted affidavits of plaintiffs, their members and third-parties, along with certain stipulations of fact entered into by defendants, were sufficient to provide a legal basis for court-ordered interim relief and, ultimately, for the permanent relief granted. *See, e.g., N.Y.N.O.W. v. Terry*, 704 F. Supp. at 1257-62; *N.Y.N.O.W. v. Terry*, 697 F. Supp. at 1329-34. Thus, the associational plaintiffs have standing to bring this action as representatives of their members.

C. City of New York

In its intervenor complaint, the City asserted that Operation Rescue's activities constituted a public nuisance endangering the public safety and welfare, and caused a drain on the public fisc due to the need to respond to demonstrations without advance notice. In light of the ample proof at trial supporting these allegations, it is clear that the City has standing to intervene. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-10 (1979).

II Jurisdiction

On appeal, defendants renew their argument that their timely filed notices of appeal divested the district court of jurisdiction to consider plaintiffs' motion for summary judgment and permanent injunctive relief. Defendants appealed from (1) the October 27 preliminary injunction, (2) the August 31 order awarding plaintiffs fees and expenses under Fed. R. Civ. P. 37(a)(4), (3) the November 4 order directing payment of contempt sanctions to plain-

tiff N.O.W., and (4) the December 9 order directing Operation Rescue to pay expenses associated with its violation of the TRO to the City of New York.

As a general rule, an appeal may be taken only from a final judgment. Because it is a waste of judicial resources for two courts to be considering the same issues in the same case at the same time, the filing of a notice of appeal is jurisdictionally significant; it terminates the district court's consideration and control over those aspects of the case that are on appeal. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Actions thereafter taken by the district court are taken without jurisdiction. See *Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir.) (appeal filed divests district court of power to grant or deny relief except with Court of Appeals permission), *cert. denied*, 374 U.S. 853 (1963).

Congress permits, as an exception to the general rule, an immediate appeal from an interlocutory order that either grants or denies a preliminary injunction. In such case the matter does not leave the district court, but proceeds there on the merits, unless otherwise ordered. *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906); *Thomas v. Board of Educ., Granville Central School Dist.*, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980). Further, we have held that the filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal. See *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 972-73 (2d Cir. 1975) (settled rule depriving district court of jurisdiction during appeal inapplicable where two independent proceedings involved), *cert. denied*, 426 U.S. 936 (1976); 9 Moore's *Federal Practice* ¶ 203.11 at 3-54 (2d ed. 1989).

The rule is that if an appeal is taken from a judgment determining the entire action, the district court's hands are tied, except to aid the appeal under Fed. R. App. P. 7 and 8, and to correct clerical errors under Fed. R. Civ. P. 60(a). An exception exists from an order granting or denying a preliminary injunction, which does not prevent the district court from proceeding on the merits. Another exception to total divestiture of district court jurisdiction occurs when the judgment appealed from does not determine the entire action, in which case the district court may proceed with those matters not involved in the appeal. See *id.*

For present purposes, the appealability of the district court's grant of a preliminary injunction is moot in light of our earlier denial of a stay of that relief, and because the district court subsequently granted a permanent injunction. The discovery order and contempt judgments with sanctions and expenses are interlocutory orders that must await final judgment. See *International Business Machines Corp. v. United States*, 493 F.2d 112, 114-15 (2d Cir. 1973) (order of civil contempt is interlocutory and unchallengeable by appeal until final judgment), *cert. denied*, 416 U.S. 995 (1974). Hence, none of the matters appealed from divested the district court of jurisdiction to proceed on the merits.

III Contempt

Defendants challenge the contempt proceeding arguing that it was criminal in nature, and that even if it were civil the standards for finding a party in civil contempt were not satisfied, and that the amount and disposition of the contempt sanction infringes their First Amendment rights.

A. Civil or Criminal Contempt

Defendants assert that the relief awarded—a \$50,000 judgment in favor of N.O.W., and a \$19,141 judgment in favor of the City—bears the hallmark of criminal contempt because the judgments impose “unconditional” liability, and that the district court’s failure to provide them with an opportunity to cure or purge themselves of contempt was a punitive criminal sanction. They argue that such a criminal penalty may not be imposed because defendants were not afforded the Constitutional protections of a criminal proceeding, such as the right to remain silent and the standard of proof beyond a reasonable doubt. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Absent the threat of imprisonment, these Constitutional due process protections generally are not required in a civil contempt proceeding. *See In re Grand Jury Witness*, 835 F.2d 437, 441 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1602 (1988).

The demarcation between civil and criminal contempt is well-established. The two species of contempt are distinguished by determining the purpose for which a sanction was imposed. *See Hicks on Behalf of Feiock v. Feiock*, ____ U.S. ____, 108 S. Ct. 1423, 1429 (1988) (distinguishing by “the substance of the proceeding and the character of the relief that the proceeding will afford.”). A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil. *See United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947); *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 115 (2d Cir. 1988); *In re Grand Jury Witness*, 835 F.2d at 440-41; *International Business Machines Corp. v. United States*, 493 F.2d 112, 115 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). A

sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature. See *United Mine Workers*, 330 U.S. at 302-03; *Hess*, 846 F.2d at 115.

The purpose for which the subject sanctions were imposed suggests that they are civil. On May 3, 1988 Operation Rescue conducted a demonstration outside a Queens, New York clinic, ignoring the state court's second TRO, which had been personally served on defendant Terry. As a result, the district court modified the state court's order by including coercive sanctions of \$25,000 for each *subsequent* daily violation of its order. At this point, there is no doubt that the sanctions were entirely conditional and coercive. On the evening of May 4, 1988 defendant Terry was notified by his counsel of the district court's modified order. The following day defendants moved unsuccessfully to vacate it. In short, defendants were forewarned on May 4 and May 5, 1988 that future violations would result in monetary sanctions. The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights. See *Feiock*, 108 S. Ct. at 1429-31 (a fine payable into court is remedial and civil "when the defendant can avoid the fine simply by performing the . . . act required by the court's order.'). Faced on May 5, 1988 with a choice between compliance or noncompliance with the district court's order, defendants chose the latter course.

The factual determination of noncompliance—the assessment of whether the standards showing contempt were satisfied—and the resulting imposition of fines necessarily occurred after defendants' ample opportunity to

comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

B. *Finding of Contempt*

A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply. See *EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986); *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.) (*per curiam*), *cert. denied*, 454 U.S. 832 (1981). These prerequisites have been satisfied here.

Defendants contend that the district court's May 4 TRO was unclear and unconstitutionally vague because it contained prohibitions on "tortious harassment" and limitations allowing only "reasonably quiet conversation" in sidewalk counseling that are so fraught with ambiguity as to be an unconstitutional hindrance on their First Amendment rights.

Fed. R. Civ. P. 65(d) requires that injunctive orders be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (*per curiam*); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988) (order must be reasonably clear so that ordinary person knows precisely

what acts are prohibited). To comply with the specificity and clarity requirements, an injunction must "be specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985).

The May 5 order was sufficiently clear as to what acts were proscribed. It prohibited trespass and obstruction that had the effect of blocking "ingress into and egress from any facility at which abortions are performed" within a specific geographic area. It barred physical abuse and tortious harassment of patients and employees. These prohibitions were balanced by language expressly permitting sidewalk counseling in a reasonably quiet and non-threatening manner. *Cf. Portland Feminist Women's Health Ctr.*, 859 F.2d at 685-87 (preliminary injunction prohibiting obstruction of access to clinic upheld under Rule 65(d) and First Amendment). The conduct that lay between that which was prohibited and that which was permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. Therefore the order was specific enough to serve as the foundation for a contempt citation.

Further, there is ample proof of defendants' noncompliance based on the record and the parties' three stipulated statements of fact. It was stipulated that on May 4 defendant Terry received notice from his counsel that the district court had adopted and modified the state court order; that on May 5 and May 6 Operation Rescue conducted demonstrations in Hicksville, New York and in Manhattan; and that defendant Terry "personally participated in physically blocking access to the [Manhattan] abortion facility" and failed to instruct Operation Rescue participants to obey the court order prohibiting their obstruction

of the facilities. Moreover, the stipulations suggest that defendants did not diligently attempt to comply with the court order in a reasonable manner. The sequence of events shows that defendants proceeded with the demonstrations, even though there was ample opportunity to comply with the court order either by curtailing their scope or by stopping them altogether. Since no attempt—much less a diligent one—at compliance has been shown, proof of non-compliance was established by clear and convincing evidence. Accordingly, defendants were properly held in contempt and are liable jointly and severally for the sanctions subsequently imposed.

Defendants' insistence that Operation Rescue is not an entity subject to being held in contempt is meritless. Although not organized in corporate or partnership form, it produces literature, possesses a mailing address, engages in correspondence, tacitly enrolls a membership, seeks donations in its name and regularly organizes protest demonstrations on a wide scale. Thus, it possesses adequate characteristics of a legal entity to be held in contempt.

There is also no doubt that Terry may be held personally liable for civil contempt sanctions because of his acknowledged role as leader of Operation Rescue. His failure to instruct his followers that the TRO prohibited their goal of blocking entry to facilities providing abortion services and his own example of noncompliance subject him to contempt penalties under the express terms of the May 5 order that encompassed "the defendants, the officers, directors, agents and representatives of defendants" See *United Mine Workers*, 330 U.S. at 304-06 (adjudging union president, as union leader and organizer of strike, in contempt for non-compliance with order).

C. *Amount of Sanctions Awarded City*

A civil contempt sanction may, as noted, serve either to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. See *United Mine Workers*, 330 U.S. at 303-04; *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56 (2d Cir.), cert. denied, 459 U.S. 832 (1982). Compensatory sanctions should reimburse the injured party for its actual damages. *United Mine Workers*, 330 U.S. at 304. When imposing coercive sanctions, a court should consider (1) the character and magnitude of the harm threatened by the continued contumacy, (2) the probable effectiveness of the sanction in bringing about compliance, and (3) the contemnor's financial resources and the consequent seriousness of the sanction's burden. *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 110 (2d Cir. 1987); *Perfect Fit*, 673 F.2d at 57. See also *United Mine Workers*, 330 U.S. at 304. The ultimate consideration is whether the coercive sanction—here, a fine—is reasonable in relation to the facts. That determination is left to the informed discretion of the district court. See *In Re Grand Jury Witness*, 835 F.2d at 443.

The trial court warned defendants that if they failed to provide advance notice, they would be liable for the City's additional costs. The City submitted a statement of excess costs caused by the May 5 and 6 demonstrations. Such constitutes adequate proof of actual losses suffered by the City due to defendants' contumacy, and warranted the district court in directing defendants, jointly and severally, to pay it \$19,141.

D. *Award of Sanctions to N.O.W.*

Judge Ward also determined that a coercive sanction of \$25,000 for each successive act of contempt was appropriate, and that—as an added element of coercion—any such fines were to be paid directly to plaintiff N.O.W. In granting the plaintiffs' motion for civil contempt, he ultimately rendered a judgment of \$50,000 in favor of N.O.W., see 697 F. Supp. at 1338. The principles governing sanctions compel a different result with respect to this judgment.

Defendants first challenge the sanction arguing that the district court failed to inquire into defendants' financial resources, their capacity to pay such a fine and the consequent seriousness of the burden imposed upon Operation Rescue and Terry. This argument is unpersuasive. At the May 4 TRO hearing, Judge Ward made a reasonable inquiry into defendants' ability to pay the sanction by suggesting that they file affidavits of financial ability. One was never provided. Later, they refused to give plaintiffs any information regarding their financial resources. A contemnor's failure to provide financial information upon which the burden of a sanction may be evaluated "may not be charged . . . against the [plaintiffs] or result in a holding that the district court abused its discretion in imposing the sanction." *In re Grand Jury Witness*, 835 F.2d at 443. Hence, the amount of the sanctions imposed was not inappropriate.

But the district court abused its discretion when it allocated this coercive sanction to plaintiff N.O.W. N.O.W. had made no showing of compensable injury or actual loss due to defendants' failure to obey the court order. The district court considered the \$50,000 sanction to be a coercive and not a compensatory fine, see 697 F. Supp. at 1332-33,

and it believed that directing payment to N.O.W. would enhance the sanction's coercive effect. *Id.* at 1333. In this view it was mistaken.

In *United Mine Workers*, the Supreme Court acknowledged that civil contempt sanctions could be imposed "to compensate the complainant for losses sustained," based upon evidence of such loss or injury. 330 U.S. at 303-04. A sanction may, of course, be both coercive and compensatory. Yet, some proof of loss must be present to justify its compensatory aspects. *See, e.g., General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379-80 (9th Cir. 1986) (vacating award of \$400,000 to complainant because there was nothing in the record to indicate such loss); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983) (limiting compensatory awards to those losses actually sustained on account of the contempt); *Winner Corp. v. H.A. Caesar & Co.*, 511 F.2d 1010, 1015 (6th Cir. 1975).

Plaintiffs respond that complainants in earlier cases have been awarded coercive civil sanctions. But such cases are either distinguishable or indicate merely that a complainant's evidentiary burden is not great in the contempt context. *See, e.g., State of N.Y. v. Shore Realty Corp.*, 763 F.2d 49, 54 (2d Cir. 1985) (coercive fines for clean-up of hazardous waste may be payable to state for whose benefit orders issued); *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 857, 858 n.1 (2d Cir. 1984) (noting that a district court may rely on "general estimates" of loss in calculating a sum designed to coerce compliance).

Inasmuch as no proof of loss was offered on behalf of N.O.W., no evidence of actual injury due to Operation Rescue's activities was shown and there was no evidence that awarding the contempt sanction to N.O.W. would have additional coercive effect on defendant's behavior,

the district court's order directing defendants jointly and severally to pay a \$50,000 contempt sanction to N.O.W. must be modified by directing that sanction to be payable into court.

IV Discovery

Defendants next question the imposition of sanctions under Fed. R. Civ. P. 37(a)(4). Rejecting defendants' cross-motion for a protective order and privileges asserted under the First, Fourth, Fifth and Fourteenth Amendments, Judge Ward held that defendants' resistance to plaintiffs' reasonable discovery requests was not "substantially justified" and therefore awarded costs and fees against defendants and their counsel, jointly and severally, in the amount of \$16,142.75.

Discovery rulings and the imposition of sanctions under Rule 37(a)(4) are governed by a clear abuse of discretion standard. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (*per curiam*); *Corporation of Lloyd's v. Lloyd's U.S.*, 831 F.2d 33, 36-37 (2d Cir. 1987) (Rule 37(a)(4) sanctions); *Robertson v. National Basketball Ass'n*, 622 F.2d 34, 35-36 (2d Cir. 1980) (discovery rulings). Here there was neither an abuse of discretion nor any viable basis for the broad spectrum of privileges sought by defendants. Because there is no merit in defendants' asserted Fourth and Fourteenth Amendment privileges, nor in Terry's assertion of spousal privilege, or in his argument that the district court lacked authority to order merits discovery until he had an opportunity to appeal the issue of plaintiffs' standing,⁴ we dis-

⁴ Terry argues that the district court lacked authority under *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268 (1988), to order merits discovery until he had an opportu-

cuss only defendants' assertions of privilege under the First and Fifth Amendments.

A. First Amendment Privilege

The Supreme Court has recognized that disclosure compelled under court order may constitute "a restraint on freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); see also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543-44 (1963) (reversing as unconstitutional contempt conviction upon failure to disclose membership lists to subversive activities committee because disclosure would interfere with associational rights); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (reversing convictions upon failure to disclose membership lists because interference with associational rights outweighed government interest in disclosure). Defendants rely on these cases for the proposition that plaintiffs' discovery requests interfere with their First Amendment rights of free speech and association, and that there is no "cogent and compelling" governmental interest to justify the disclosure. Reliance on this line of cases is misplaced.

In each of the cited cases the party withholding information from a court or public agency made a *prima facie* showing that disclosure would infringe its First Amendment rights. For example, in *NAACP v. Alabama*, the

nity to appeal the district court's finding that plaintiffs had standing to sue. But that case concerned whether *non-party* witnesses, held in contempt for failure to comply with discovery orders, could challenge the district court's subject matter jurisdiction in defense of the contempt citation, notwithstanding the absence of a final judgment in the underlying action. 108 S. Ct. at 2270. Terry is a party and appeal of his contempt citation therefore must await final judgment.

NAACP made an "uncontroverted showing that on past occasions" disclosure of members' identities "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. Similarly, in *Bates* there was "substantial uncontroverted evidence that public identification of persons . . . as members . . . had been followed by harassment and threats of bodily harm." 361 U.S. at 524. Neither the state's interest in regulating intra-state business, *NAACP v. Alabama*, 357 U.S. at 464, nor the city's power to impose licensing taxes, *Bates*, 361 U.S. at 524-25, outweighed the possible encroachment on First Amendment rights.

In contrast, Operation Rescue and Terry do not articulate how compliance with plaintiffs' discovery requests would interfere with their First Amendment activities. They merely assert that plaintiffs cannot identify any compelling interest to be served by compliance. A party resisting discovery need not make a showing of harm or other coercion; but before the burden shifts to plaintiffs to demonstrate the necessary compelling interest in having discovery, defendants must at least articulate some resulting encroachment on their liberties. See *Bates*, 361 U.S. at 524; *United States v. Citizens State Bank*, 612 F.2d 1091, 1093-94 (8th Cir. 1980). Mindful of the crucial place speech and associational rights occupy under our constitution, we hasten to add that in making out a *prima facie* case of harm the burden is light.

The discovery requests were directed toward ascertaining defendants' financial capacity to satisfy contempt judgments likely to issue against them. In light of his counsel's assertion that Terry was penniless, it was a relevant inquiry. Operation Rescue members and participants

assert that disclosure of bank records and cancelled checks would have an adverse effect on their First Amendment rights, citing *Citizens State Bank*. There the court found that the district court had erred in not considering the claim of a taxpayer reform group that an Internal Revenue Service summons would infringe upon their right of free association. 612 F.2d at 1093. In that case the taxpayer group had submitted three uncontroverted declarations "detailing the adverse effects of the summons on . . . organizational and fundraising activities." *Id.* at 1094. Having thus made the *prima facie* showing of "arguable First Amendment infringement," the burden of proof then shifted to the government to demonstrate a compelling need for the documents requested by the IRS summons. *Id.* See also *Baldwin v. Commissioner of Internal Revenue*, 648 F.2d 483, 488 (8th Cir. 1981) (remanding due to Tax Court's failure to consider appellant's colorable claim of First Amendment privilege against IRS discovery requests).

There is no explanation here of how compliance with discovery orders will encroach on defendants' First Amendment rights. The taxpayer group in *Citizens*, in contrast, alleged that IRS access to documents would discourage potential members from joining the organization for fear of government retaliation. *Id.* at 1093. Absent a more specific explanation of the consequences of compliance with discovery, defendants failed to make the required initial showing of potential First Amendment infringement. It is therefore unnecessary to weigh those interests advanced by the discovery requests.

B. Fifth Amendment Privilege

Defendants also broadly invoke the protections of the Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V. The privilege against self-incrimination may "be asserted in any proceeding, civil or criminal . . . and . . . protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445-46 (1972). This privilege is invoked on behalf of Operation Rescue and defendant Terry, individually and as its representative.

Operation Rescue can claim no Fifth Amendment privilege since the privilege is " 'limited to its historic function of protecting only the natural individual from compulsory incrimination.' " *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (quoting *United States v. White*, 322 U.S. 694, 701 (1944)). Collective entities such as partnerships, *Bellis*, 417 U.S. at 96-97, and other unincorporated associations, *White*, 322 U.S. at 699-701 (union), cannot invoke the personal privilege. Inasmuch as Operation Rescue maintains bank accounts, engages in correspondence and business in its name, employs several people, including an accountant, and generally holds itself out as a separate collective entity, it is an unincorporated association that can make no claim to a Fifth Amendment privilege.

Moreover, defendant Terry may not invoke his personal privilege when acting as the representative of Operation Rescue. He appeared at the deposition as Operation Rescue's spokesperson. In that capacity, the discovery requests asked him to produce documents and answer

questions relating to Operation Rescue's financial structure and soundness. The discovery requests were reasonable and relevant because of plaintiffs' need to ascertain whether they could request and collect contempt judgments. *Cf.* Fed. R. Civ. P. 26(b)(1) (scope of discovery permitted under Federal Rules). As custodian of Operation Rescue records and as its representative, Terry has no act of production privilege under the Fifth Amendment, nor could he refuse to answer questions relating to Operation Rescue on the grounds that they may be incriminating. *See Braswell v. United States*, 108 S. Ct. 2284, 2295 (1988) (corporate custodian may not resist subpoena on ground that his act of production is personally incriminating); *Bellis*, 417 U.S. at 100 (no privilege claimed by custodian of corporate records regardless of how small the corporation); *White*, 322 U.S. at 699 ("In their official capacity [as representatives of a collective entity], they have no privilege against self-incrimination.").

Finally, Terry asserts the privilege personally. He argues that the discovery requests *as a whole* have testimonial significance and may work to incriminate him in now-pending or potential criminal proceedings. During the July 7 deposition, Terry refused to answer over 50 questions. These related to (1) his whereabouts and activities between April 26, 1988 and May 6, 1988, when several demonstrations occurred, (2) Operation Rescue's finances, activities and employees, and (3) his social security number and his wife's assets, income, and involvement with Operation Rescue. Often he invoked several privileges simultaneously without explaining which privileges applied or in what manner. The district court held that Terry could properly refuse to answer questions relating to his activities in late April and early May of 1988. Terry claims privilege with respect to all the questions he refused to answer.

Standing alone, a witness' sincere belief is not enough to foreclose his answering or making a disclosure—"his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). In deciding whether a witness or deponent may justifiably refuse to answer a question, the court must determine whether the incriminating nature of the answer is evident, in light of "the implications of the question, in the setting in which it was asked." *Id.* at 486, 487-89. When the incriminatory nature of the answer is not readily apparent the witness must explain how the answer may incriminate him. See *United States v. Edgerton*, 734 F.2d 913, 919 (2d Cir. 1984) (acknowledging that this burden "forces a witness to come dangerously close to doing that which he is trying to avoid."); see also *United States v. Rylander*, 460 U.S. 752, 759 (1983).

Defendant Terry makes no attempt to explain how his answers may incriminate him, instead arguing that his assertion of privilege "requires no explanation." Concededly, a witness is not required to *prove* that an answer will be incriminating "in the sense in which a claim is usually required to be established in court," *Hoffman*, 341 U.S. at 486, but he must demonstrate that the question and the context in which it was posed somehow present a possibility of incrimination. The questions asked in the case at hand were posed in a civil context in connection with plaintiffs' motion for civil contempt. Except for those questions concerning Terry's activities from April 26, 1988 to May 6, 1988, they requested nothing that could link Terry with criminal activity. We think the district court wisely exercised its discretion in holding that Terry could properly refuse to answer only those questions, but must answer the others.

C. Discovery Costs

Costs associated with plaintiffs' motion to compel discovery in an amount of \$16,142.75 were assessed against defendants and their counsel, jointly and severally. Upon granting a motion to compel discovery, a court may "require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the [discovery] order . . . unless the court finds that the opposition to the motion was substantially justified" Fed. R. Civ. P. 37(a)(4).

No substantial justification for defendants' broad claims of privilege—except for Terry's personal privilege noted above—existed. The transcript of the deposition indicates that Terry invoked privileges almost entirely on advice from his counsel. Analysis of the claim of privilege leads inevitably to the conclusion that it was made to keep from plaintiffs information necessary to their civil action. In short, defendants' attack on the district court's discovery holdings must fail.

V Summary Judgment

The district court granted plaintiffs' motion for summary judgment, resulting in the issuance of a permanent injunction, on their claim under 42 U.S.C. § 1985(3) and on their state law trespass claim. 704 F. Supp. 1247, 1257-61, 1261 n.18 (S.D.N.Y. 1989). It held that defendants had conspired with discriminatory animus against a class of women to infringe upon their right of interstate travel, *id.* at 1260, and found defendants had similarly conspired to deprive members of the same class of their right to choose

and obtain abortion services. *Id.* at 1260-61. The district court also granted the City's motion for summary judgment on its public nuisance claim. *Id.* at 1261-62.

Under Fed. R. Civ. P. 56(c) summary judgment is properly granted if the evidence offered demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A reviewing court must examine the record in the light most favorable to the party opposing the motion, applying the same standards as the district court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986); *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988). In the case at hand, Judge Ward's decision was based upon the parties' stipulations of fact and upon defendants' public declarations, literature and testimony.

We analyze first the substantive bases for granting summary judgment.

A. Section 1985(3)

Section 1985(3) provides in part that

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is

injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). To prevail on a § 1985(3) claim, a plaintiff must prove that defendants (1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right or privilege of a citizen of the United States. See *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

It is well-settled that § 1985(3) provides a cause of action for private conspiracies. See *United Bhd. of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 832-33 (1983); *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *Griffin*, 403 U.S. at 101, 104 (Congress may constitutionally provide cause of action against private conspiracies). When the asserted constitutional deprivation is based upon a right guaranteed against government interference—for example, rights secured by the Fourteenth Amendment—plaintiffs must demonstrate some “state involvement.” See *Carpenters*, 463 U.S. at 833.

Despite its applicability to purely private conspiracies, § 1985(3) is limited in two interrelated ways. First, the Supreme Court has emphasized that § 1985(3) may not be construed as a “general federal tort law.” *Griffin*, 403 U.S. at 101-02. Rather, a plaintiff must demonstrate

“some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Id.* at 102. Second, not all classes of persons fall within the protective ambit of § 1985(3). *See Carpenters*, 463 U.S. at 835-37. The Supreme Court has specifically left open the question of whether this statute was aimed against any other class-based animus than that directed against blacks and their supporters at the time of its enactment. *Carpenters*, 463 U.S. at 836-39; *Griffin*, 403 U.S. at 102 n.9. Legislative history, the Supreme Court acknowledged, supported the view that § 1985(3) went beyond racially motivated conspiracies, but it held that animus based generally upon the economic views or commercial interests of a class were beyond the statute’s scope. *Carpenters*, 463 U.S. at 837-39. Thus, the threshold issue is whether § 1985(3) encompasses conspiracies motivated by an animus against a class of women seeking medical and abortion-related services.

B. *Women as a Protected Class*

The broad language of § 1985(3) does not exclude women from its protections. It speaks instead of “persons” and “class[es] of persons,” and seeks to secure to them the “equal protection of the laws” and the “equal privileges and immunities under the laws.” Moreover, the Act forbids conspiracies that deprive such persons of “any right or privilege of a *citizen* of the United States.” § 1985(3) (emphasis added). Admittedly, the 42nd Congress’ principal concern was to protect newly emancipated blacks, and those who championed them, against conspiracies. *See Carpenters*, 463 U.S. at 836 (discussing legislative history). But the Act’s supporters in Congress repeatedly stressed the theme of preventing “deprivations

which shall attack the equality of rights of American citizens." See *Griffin*, 403 U.S. at 100 (quoting Cong. Globe, 42nd Cong., 1st Sess., App. 478 (remarks of Rep. Shellaburger)).

In reviewing history, we should not forget that women in 1871 were not accorded the full rights of citizenship. Today, they are. See, e.g., U.S. Const., amend. XIX (giving women right to vote upon ratification August 18, 1920). Distinctions based upon immutable characteristics such as sex have long been considered invidiously discriminatory. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (Congress concluded that classifications based on sex are inherently invidious). By its very language § 1985(3) is necessarily tied to evolving notions of equality and citizenship. As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act.

Moreover, this Circuit as well as other Circuits have held that § 1985(3) encompasses women as a class, or classes based on political associations, or those based on ethnicity, none of which groups were specifically contemplated by the 42nd Congress. See *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) ("§ 1985(3) extends . . . to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty."); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (political views); *McLean v. International Harvester Co.*, 817 F.2d 1214, 1218-19 (5th Cir. 1987) (section protects classes characterized by "some inherited or immutable characteristic" or by "political beliefs or associations"); *Hobson v. Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984) (political affiliations with racial overtones), *cert. denied*, 470 U.S. 1084 (1985); *Keat-*

ing v. Carey, 706 F.2d 377, 386-88 (2d Cir. 1983) (political affiliation); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (women purchasers of disability insurance); *Novotny v. Great American Federal Savings v. Loan Ass'n*, 584 F.2d 1235, 1241-43 (3d Cir. 1978) (*en banc*) (women), *vacated on other grounds*, 442 U.S. 366 (1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978) (sex and ethnicity).

We have previously stated that “[a] narrow interpretation of the statute as protecting only blacks and other analogously oppressed minorities is untenable in light of the history of the Act.” *Keating*, 706 F.2d at 387. It is likewise untenable to believe that Congress would provide a statutory remedy against private conspiracies, the purpose of which is to deny rights common to every citizen, and exclude women as a class from the shelter of its protection. We therefore hold that women may constitute a class for purposes of § 1985(3).

C. Defendants’ Activities Under § 1985(3)

The record plainly indicates that defendants engaged in a conspiracy to prevent women from obtaining access to medical facilities. Operation Rescue literature encourages participants to gather in front of clinics and blockade them. Defendants agreed with other individuals to engage in unlawful activity, including violations of both state law and women’s constitutional rights. Moreover, defendants facilitated the conspiracy by providing transportation and accommodations to participants. This type of concerted action ultimately involves a conspiracy to engage in unlawful activity.

Defendants urge that plaintiffs have demonstrated no class-based animus. They contend that “the concept of

animus is one of ill-will.” Yet animus merely describes a person’s basic attitude or intention, and because defendants’ conspiracy is focused entirely on women seeking abortions, their activities reveal an attitude or animus based on gender. Defendants’ argument that their actions are directed against an activity, or only a “subgroup” of women rather than women in general, is insufficient to escape the scope of § 1985(3). In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable, such as travelling interstate with the perceived purpose of promoting civil rights. *See, e.g., Griffin*, 403 U.S. at 90. It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them. The denial of ill-will towards the women they target and the claim that defendants’ actions will benefit these women amount to an argument that “we are doing this for your own good”; a contention that usually shields one’s actual motive.

Defendants cannot seriously urge that they do not intentionally infringe on the right of women to seek access to the clinics. That was one of the major objectives of the demonstrations of May 2, May 3, May 5, May 6 and October 29, 1988 all of which were purposefully aimed to deny the right of women as a class to gain access to clinics. And, to a significant degree, they succeeded. The record is replete with incidents supporting this conclusion and the district court’s findings in this regard cannot be said to be clearly erroneous. Consequently, it is apparent that defendants acted within the scope of § 1985(3) by (1) engaging in a conspiracy; (2) against a cognizable class of persons,

with invidious class-based animus; and (3) committed the requisite overt acts in furtherance of the conspiracy.

The remaining question is whether this conspiracy deprived plaintiffs and the women on whose behalf this claim was asserted of any constitutional right. Plaintiffs allege that these rights were violated in two ways: first, that the conspiracy intended to and did infringe upon women's constitutionally guaranteed right to travel; and, second, that the conspiracy intended to and did infringe upon women's right to obtain abortions.

(1) *Right to Travel*

The right to interstate travel is guaranteed by the Constitution. See *United States v. Guest*, 383 U.S. 745, 758 (1966); *Griffin*, 403 U.S. at 105-06. Deprivations of that right are actionable under § 1985(3) with no need to show any state action or involvement. *Carpenters*, 463 U.S. at 832-33; *Novotny*, 442 U.S. at 383 (Stevens, J., concurring); *Griffin*, 403 U.S. at 105-06 (cases "firmly" establish right of interstate travel "is assertable against private as well as governmental interference.'). See also *Guest*, 383 U.S. at 760 (private conspiracy to infringe upon right to travel actionable under 18 U.S.C. § 241, criminal analogue of § 1985(3)). In *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court held that a residency requirement in a state statute regulating abortion violated the right of interstate travel. *Id.* at 200 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)). The High Court specifically held that the right to travel "protects persons who enter [a State] seeking the medical services that are available there." *Id.*

As noted, women referred by out-of-state clinics often travel to New York City seeking its superior medical ser-

vices. Patients residing in other states, the District of Columbia, and Canada, sometimes must undergo a two-day procedure for second trimester abortions. Moreover, defendants' own literature expresses their understanding that clinics in New York City and its environs are preferred targets of demonstrations because of the range of abortion-related services offered there. Jeannine Michael, a counselor at the Eastern Women's Center testified that "[U]nexpected closure of [a clinic] would be particularly acute for our out-of-state clients, whose travel, work, childcare and financial problems would be greater because they would be more difficult to resolve when some distance from home." Further, the threat of future demonstrations with the consequent closing of clinics may expose women seeking the more medically serious and lengthy second trimester procedures to harm.

Such encumbrances constitute an infringement upon these women's right to travel. Thus, plaintiffs are entitled to summary judgment on their § 1985(3) claim due to the deprivation of the individual right of a citizen to unhindered interstate travel to seek medical services.

(2) Right to Obtain an Abortion

With respect to the right to obtain an abortion, the district court granted plaintiff's motion for summary judgment on this claim as well. It ruled that because the right to privacy stems from the Fourteenth Amendment's prohibition on state or governmental interference, plaintiffs were required to demonstrate "state involvement." The district court reasoned that defendants' failure to notify police officials prior to their demonstrations and, on one occasion, their actual agreement with Dobbs Ferry, New York police that no demonstrators would be arrested, suf-

ficiently showed state involvement for purposes of § 1985(3). 704 F. Supp. at 1260 & n.16. Whether or not one agrees with this reasoning, having already found the interference with a right to travel an independent constitutional ground upon which to affirm the district court's § 1985(3) holding, it is unnecessary for us to rule on this constitutional claim.

D. *Plaintiffs' Trespass Claim*

Summary judgment in favor of plaintiffs on their trespass claim was also appropriate. Under New York law, trespass is the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner. *See Ivancic v. Olmstead*, 66 NY2d 349, 352 (1985), *cert. denied*, 476 U.S. 1117 (1986); *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954). To be liable, the trespasser need not anticipate the damaging consequences of his acts, but need only intend the act that amounts to an unlawful intrusion upon and interference with the property rights of another. *Phillips*, 307 N.Y. at 331. The threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result. *See Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 268 (1927).

Defendants say that their demonstrations occur entirely on public sidewalks in front of the clinics, and do not involve an intrusion on another's property. But the uncontradicted facts describe intrusions on clinic properties by Operation Rescue demonstrators. Typically they sat on the front steps leading up to the facility's main entrance until police were forced to remove them. Because these findings cannot be said to be clearly erroneous, summary judgment on the trespass claim was proper.

E. City's Public Nuisance Claim

The City of New York claimed that these activities constituted a public nuisance because Operation Rescue demonstrations endanger the safety and welfare of City residents, particularly those women seeking to use plaintiff's clinics and other medical facilities. A public nuisance "consists of conduct . . . which [offends or interferes with] the public in the exercise of rights common to all, in a manner such as to . . . interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 NY2d 564, 568 (1977). The offense, "being one common to the public, should be enjoined at the suit of the sovereign's law officer." *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 84 (1949). Thus, the City is a proper party to bring an action to restrain a public nuisance that allegedly may be injurious to the health and safety of its citizens, *see id.* at 83-84, and it need not prove that it has suffered any actual, as opposed to threatened, harm in order to obtain injunctive relief. *See State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050-52 (2d Cir. 1985).

As a substantive matter, defendants state that reliance on the public nuisance doctrine is misplaced because a women's right to obtain an abortion is not a right common to all members of the community. Rather, they assert, it is a wholly private right and interference with it is not actionable as a public nuisance. They claim that the City has not alleged interference with rights common to the community at large.

The right shown to be disrupted is not, as defendants suggest, merely the right to obtain an abortion. The City

intervened to vindicate the more general right of City residents to obtain medical services—a right common to all residents of New York. Women go to the clinics for a panoply of medical, prenatal and counseling services. Abortion may be the principal focus of defendants' efforts, but their tactics interfere with a broader spectrum of rights. The demonstrations simply pose a special threat to women seeking to obtain abortions because of delays and cancellations caused by the blockades.

Moreover, as the district court noted, defendants' chosen tactic of *en masse* demonstrations has obstructed vehicular and pedestrian traffic in New York's already burdened streets. 704 F. Supp. at 1262. We have no doubt that—absent the requested relief—the health and security of a considerable number of persons was and would be endangered by the demonstrations. Accordingly, the district court correctly found that defendants' activities constituted a public nuisance, and properly granted the City summary judgment on this claim.

VI *Permanent Injunction*

A. *Propriety of Its Issuance*

A permanent injunction was issued on January 10, 1989. Because plaintiffs have shown that they are entitled to summary judgment on the foregoing claims, we must consider: (1) whether the district court properly issued the permanent injunction; and (2) if so, whether that injunction is a valid regulation of speech under the First Amendment.

Generally, to obtain a permanent injunction a party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted. *See Rondeau*

v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975). Because plaintiff clinics have standing to assert the rights of their patients, the district court properly made their female patients the primary focus of its analysis. See 704 F. Supp. at 1262-63. Those women denied access cannot be compensated by money damages; injunctive relief alone can assure them the clinics' availability. The record contains abundant evidence to support the conclusion that, absent such relief, prospective women patients will suffer irreparable harm from delayed access to clinics. See, e.g., Affidavits of Jeannine Michael and Dr. Thomas J. Mullin.

Further, defendants' stated intent to continue the blockades—notwithstanding the spectre of serious legal and financial consequences—and to act in spite of the district court's orders shows that the harm will be of a continuing nature absent an injunction. The irreparable harm flowing from defendants' activities—including the medical risks and the denial of constitutionally guaranteed rights—is real and threatens to continue. Hence, a permanent injunction properly issued.

B. Restriction of Defendants' First Amendment Rights

We therefore turn finally to analyze whether the injunction is a valid limitation on defendants' speech under the First Amendment. In reviewing an injunction that restricts the exercise of First Amendment rights, we are charged with independently determining, first, the reasonableness of the government interest and, second, whether the restrictions contained in the injunction at issue are narrowly tailored to further that interest. See *Olivieri v. Ward*, 801 F.2d 602, 605-06 (2d Cir. 1986), cert. denied, 480 U.S. 917 (1987).

Defendants' actions clearly are a form of political speech protected by the First Amendment. Consistent with the national commitment to the notion that debate on critical public issues should be robust and open, defendants are entitled to express their views on this subject, particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted. See *United States v. Grace*, 461 U.S. 171, 177-80 (1985).

Yet, the First Amendment may not be read to protect a person's right to express their views at any time, in any manner, and in any place of their choosing. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Operation Rescue's activities are subject to reasonable time, place, and manner restrictions so long as the limitations are (1) content-neutral, (2) narrowly tailored to meet a significant government interest, and (3) leave open ample alternative means of communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron*, 452 U.S. at 647-48; *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972). Assuming that a regulation is content-neutral, the reasonableness of the regulation will often depend upon "[t]he nature of a place [and] 'the pattern of its normal activities.' " *Grayned*, 408 U.S. at 116 (quoting Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)). Thus, the question "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* Under these standards, the permanent injunction passes constitutional muster. It makes no content-based distinctions. The order enjoins defendants from: "(a) trespassing on, blocking, or obstructing ingress into and egress from any facility at which abortions are performed [within a prescribed

geographic area; and] (b) physically abusing or tortiously harassing persons” entering and leaving such facilities. It specifically permits “sidewalk counseling, consisting of reasonably quiet conversation of a non-threatening nature by not more than two people”; and provides that nothing in its directions is to be construed as limiting the exercise of defendants’ legitimate First Amendment rights. See *supra* note 1.

Content-neutral regulations of expression are “those that ‘are *justified* without reference to the content of the regulated speech.’ ” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). The primary concern of content-neutrality is that no speech or expression of a “particular content” is “single[d] out” by the government for better or worse treatment. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771; see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (government regulation of expression may not be sympathetic or hostile toward communicator’s message). The test is neutrality. Here, we discern no discrimination against the defendants or their message. The message—that abortion is wrong, immoral, and must be stopped—is not singled out for unfavorable treatment. The injunction is not a ban, nor is it a ban masquerading as a limitation. In fact, the order ensures that a forum remain open to defendants to express their views both to the general public and to those entering or leaving the clinics.

As we view it, the order regulates the time, place and manner of expression in a way that neutrally balances the rights of Operation Rescue to express its views, of women to enter the clinics unhindered by an invasion of their

rights, and of the clinics to provide necessary medical services. See *Clark*, 468 U.S. at 298 (noting that test for content-neutral time, manner and place restrictions differs little from balancing test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Because the injunction balances these conflicting rights and interests, it is narrowly tailored.

Defendants are particularly concerned that their chosen manner of exercising their First Amendment rights—blockading and effectively shutting down the clinics—is prohibited by the district court’s injunction. But blocking access to public and private buildings has never been upheld as a proper method of communication in an orderly society. See, e.g., *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (upholding law that prohibited picketing in front of courthouse unreasonably interfering with free ingress or egress); *Cox v. Louisiana*, 379 U.S. 559, 562-64 (1965) (*Cox II*); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (*Cox I*) (demonstrators may not cordon off street or entrance to a building allowing no one to pass who refused to listen to them).

Further, the injunction effectuates significant governmental interests in maintaining public safety—controlling traffic on the streets and sidewalks of a busy, urban environment; again, it ensures that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another. Upon our independent review, we are satisfied therefore that the permanent injunction was appropriately issued in this case and that it did not unreasonably restrict defendants’ First Amendment rights.

CONCLUSION

Having examined all of defendants' other contentions, we conclude that they are without merit. Accordingly, the orders of the district court—except the order directing payment of contempt fines of \$50,000 to plaintiff N.O.W., which is modified and directed to be paid into court—are affirmed.

Modified, and as modified, affirmed.

Temporary Restraining Order Dated May 5, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

—against—

RANDALL TERRY, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

UPON the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the statement of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on May 4, 1988, it is hereby

ORDERED that the temporary restraining order issued by Justice Herman Cahn on April 28, 1988, and modified by Justice Cahn on May 2, 1988, is hereby continued as modified as of 8:40 P.M. on May 4, 1988 by order of this Court on the record in open court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order are:

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that defendants' failure to comply with this Order, shall subject them to civil damages of \$25,000 per day for any violations of this Order; and it is further

ORDERED that security in the amount of \$5,000.00 be posted by plaintiffs prior to May 6, 1988 at 5:00 P.M.; and further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the \$25,000 per diem amount ordered above, defendants shall be liable to pay any excess costs incurred by the City of New York as a result of defendants' failure to provide the City with advance notice of the location of their demonstration, unless defendants give the New York City Police Department twelve hours advance notice at the phone number provided to defendants' counsel in open court of the location of each day's demonstration.

Copies of this signed order shall be served upon the Financial Deputy in room 14 and the Clerk in room 18.

/s/ ROBERT J. WARD
Robert J. Ward
United States District Judge

Dated: NY, NY
May 5, 1988
9:45 A.M.

Discovery Opinion Dated August 31, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
and PRO-CHOICE COALITION,

Plaintiffs,

—and—

CITY OF NEW YORK,

Plaintiff-Intervenor,

—against—

RANDALL TERRY; OPERATION RESCUE; REVEREND JAMES
P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE
DOE(S), the last two being fictitious NAMES, the real
names of said defendants being presently unknown to
plaintiffs, said fictitious names being intended to desig-
nate organizations or persons who are members of defen-

dant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

MEMORANDUM DECISION

Plaintiffs commenced this action in state court, seeking to enjoin demonstrations planned by defendants and designed to disrupt the operation of medical facilities where abortions are performed. After plaintiffs had obtained a temporary restraining order from the state judge prohibiting the blocking of access to medical facilities, defendants removed the action to this Court. This court adopted the order issued by the state judge and issued its own order, containing the original prohibitions as well as additional provisions. Demonstrations continued in spite of this Court's order, and plaintiffs brought a motion for contempt pursuant to 18 U.S.C. § 401 and Rule 70, Fed. R. Civ. P. Plaintiffs sought discovery in connection with their pending contempt motion, and defendants resisted that discovery. Plaintiffs then brought the instant motion, pursuant to Rule 37, Fed. R. Civ. P., to compel production of documents and to compel answers to deposition questions. Defendants brought a cross-motion for a protective order. For the reasons that follow, plaintiffs' motion to compel production is granted, defendants' motion for a protective order is denied, and costs on the motions, including reasonable attorney's fees, are awarded to plaintiffs, pursuant to Rule 37(a)(4), Fed. R. Civ. P. The Court reserves decision on plaintiffs' underlying contempt motion and defendants' cross-motion to dismiss the complaint.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and

declaratory relief. Defendants had organized and publicized a week of protests called Operation Rescue to be carried out in the New York City area from April 30 until May 7, 1988. According to the plan, protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause plaintiffs sought to enjoin defendants, for the duration of the planned Operation Rescue, from obstructing access to any facility at which abortions were performed in New York City and the surrounding counties. Justice Cahn of the New York State Supreme Court, New York County, issued a first temporary restraining order on April 28, 1988. This order did not contain language specifically prohibiting the blocking of access to clinics.

It is undisputed that on May 2, 1988 Operation Rescue conducted a demonstration in front of a physician's office at 154 East 85th Street in Manhattan where abortions are performed. Five hundred and three protestors sat on the sidewalk in front of the office for at least five hours, and the police arrested these 503 demonstrators for disorderly conduct in blocking ingress to and egress from the office. Statement of Stipulated Facts, filed May 4, 1988 ¶ 1.

Justice Cahn held another hearing on the afternoon of May 2, 1988, in view of defendants' conduct at the demonstration earlier that day. At the conclusion of the hearing, Justice Cahn issued a second, modified temporary restraining order. *Id.* ¶ 2. This second order included an express prohibition against the blocking of access to facilities where abortions are performed.¹

1 The terms of Justice Cahn's May 2 Order are as follows:

. . . [I]t is hereby ORDERED that the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, acting in concert with them, and with notice of this order are:

1) enjoined and restrained in any manner or by any means from:

Operation Rescue conducted a demonstration on the morning of May 3, 1988 in front of a clinic at 83-06 Queens Boulevard, Queens, New York. The police arrested several hundred demonstrators for blocking ingress and egress to the clinic, and the sidewalk was cleared by approximately 11:45 a.m. *Id.* ¶¶ 3, 10.

On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed the action to this Court. This Court scheduled a hearing to be conducted in the late afternoon of the following day, May 4, 1988. Apparently, no demonstration was carried out on the morning of May 4. After argument by the parties, this Court ruled on Wednesday evening, May 4, 1988 that it would adopt and continue Justice Cahn's May 2 order and would modify it by (1) adding coercive sanctions of \$25,000 for each day that defendants violated the terms of the order; and (2) requiring defendants to notify

a) trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988,

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that. In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site.

And it is further ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights.

Exhibit A, annexed to Order to Show Cause, issued May 3, 1988.

the City of New York in advance of the location of any planned demonstration. Defendant Terry received oral notice of this Court's action from his attorney on the evening of May 4. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.

The Court signed its order on the morning of May 5, 1988, and defendants' counsel moved the next day by order to show cause to vacate the order for failure to comply with Rule 65(c), Fed. R. Civ. P. The motion to vacate was denied on May 6, and the Second Circuit on the same day denied defendants' application to stay the order pending expedited appeal. *Id.* ¶ 2.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The Demonstrators blocked ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, "Operation Rescue" demonstrators returned to the same site where they had demonstrated on Monday, at 154 East 85th Street, Manhattan, blocking access to the office. *Id.* ¶ 4. The City of New York did not receive advance notice of the location of the demonstrations on May 5 or May 6. *Id.* ¶ 5. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 5. Approximately 320 Operation Rescue demonstrators were arrested at the May 6 demonstration. *Id.* ¶ 7.

On May 31, 1988, plaintiffs filed a motion for civil contempt against all defendants, pursuant to 18 U.S.C. § 401 and Rule 70, Fed. R. Civ. R. The same day, plaintiffs served upon defendants two deposition notices, respectively requesting the appearances at depositions of defendant Randall Terry and designated witness(es) of defendant Operation Rescue. By agreement of the parties, the deposition of Randall Terry took place on July 7, 1988. Defendant Terry appeared in response to the deposition notice commanding his appearance, and also as the designated witness of Operation Rescue.

The deposition notice for Randall Terry contained the following requests for production of documents, made pursuant to Rules 30 and 34, Fed. R. Civ. P.

DOCUMENT REQUEST NO. 1.

All documents concerning Randall Terry's employment, occupations, places of residence, and income from 1985 to the present, including but not limited to income tax returns.

DOCUMENT REQUEST NO. 2

All documents concerning assets owned by or in control of Randall Terry, his family members or his agents or employees, including documents concerning any (a) bank accounts, (b) securities, (c) real property, (d) personal property, (e) cash, (f) interest in any business or corporate entity, (g) royalties, (h) dividends, (i) brokerage accounts, (j) leases, (k) trust accounts, and (l) tax returns, from 1985 to the present.

DOCUMENTS REQUEST NO. 3

All documents concerning assets owned by or in the control of Operation Rescue, its agents or employees, including documents concerning any (a) bank accounts, (b) securities, (c) real property, (d) personal property, (e) cash, (f) interest in any business or corporate entity, (g) royalties, (h) dividends, (i) brokerage accounts, (j) leases, (k) trust accounts, and (l) tax returns, from 1985 to the present.

Exhibit A, annexed to Notice of Motion, filed July 14, 1988.

The deposition notice for the designated witnesses of Operation Rescue contained the following request for production of documents, which will be referred to as Document Request Number 4:

Each witness should bring with him or her each and every document which is in the possession, custody or control of Operation Rescue and which reflects or relates to the subject matter of their testimony as set

forth above [financial resources, assets and affairs of Operation Rescue, including all income, expenditures, investments, savings, and any financial interest maintained by or financial support provided to Operation Rescue, or the plans, purposes and goals of Operation Rescue, or concerning the organizational structure of Operation Rescue.]

Exhibit B, annexed to Notice of Motion, filed July 14, 1988.

On July 6, 1988, the day before the scheduled deposition, defendants served plaintiffs with a document captioned "Defendants' objections to Plaintiffs' Request for Documents." Defendants refused to produce any of the documents covered by the four document requests, claiming privilege under the first, fourth, fifth, and fourteenth amendments to the United States Constitution. On the same day, defendants filed a cross-motion to dismiss the complaint.

During his deposition on July 7, 1988, Terry, on the advice of his counsel, refused to answer over fifty questions. Plaintiffs characterize the questions Terry refused to answer as falling into three main areas of inquiry: (i) Terry's activities between April 26, 1988 and May 6, 1988; (ii) Operation Rescue's assets, income, activities and employees; and (iii) Terry's social security number and his wife's income, assets and involvement with Operation Rescue. Terry once again claimed privilege based on the first, fourth, fifth and fourteenth amendments. In addition, he claimed a spousal privilege against answering questions relating to his wife.

On July 8, 1988 the Court held an informal discovery conference, pursuant to Local Rule 3(1), but the issues were not resolved. Thereafter, on July 14, 1988, plaintiffs filed the instant motion to compel discovery, pursuant to Rule 37, Fed. R. Civ. P. On July 21, 1988, defendants filed a cross-motion for a protective order, along with a statement of objections to plaintiffs' document requests, pursuant to Local Rule 46.

The parties briefed the issues and the Court heard argument on the matter on the afternoon of August 3, 1988. In the course of the August 3 argument, the Court indicated its

inclination to grant plaintiffs' motion to compel and to award costs on the motion to plaintiffs. The Court directed that plaintiffs' counsel present to defendants a bill of the costs incurred by plaintiffs in prosecuting the motion to compel. Defendants would then decide whether to pay plaintiffs' costs or to submit supplemental briefs to further support their position. Defendants were directed, in the event they elected to submit supplemental briefs, to file those papers by August 17, 1988. On August 16, 1988 defendants filed a Supplemental Memorandum in Opposition to Imposition of Costs, briefing the issue of defendants' claimed first amendment privilege against the requested discovery. Defendants' Supplemental Memorandum was accompanied by a cover letter to the Court indicating an intention to submit an additional "supplemental briefing on the fourth amendment and criminal contempt points . . . within the next week or so." Letter from Michael P. Tierney to the Court (August 16, 1988). Plaintiffs filed on August 24, 1988 a Response to defendants' Supplemental Memorandum.

DISCUSSION

The Federal Rules of Civil Procedure provide for broad discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 26(b)(1), Fed. R. Civ. P. So long as the information sought is "reasonably calculated to lead to this discovery of admissible evidence," that information is discoverable even if it would not itself be admissible at trial. *Id.* An objection to discovery may be based on the relevancy of the requested information, a claim of undue burden, or on any of several recognized privileges. If the parties to an action are unable to resolve a discovery dispute, then the party requesting information, after requesting an informal discovery conference pursuant to Rule 3(1) of the Civil Rules for the United States District Courts for the Southern and Eastern Districts of New York and obtaining the leave of Court, may file a motion to compel discovery, pursuant to Rule 37(a), Fed. R. Civ. P.

Costs and attorneys fees are ordinarily awarded on discovery motions in order to deter abusive discovery practices and to promote informal resolution of discovery disputes, *See* Rule 37(a)(4), Fed. R. Civ. P. and Notes of the Advisory Committee.

In the instant case, defendants have objected to the requested discovery claiming privileges based on the first, fourth, fifth, and fourteenth amendments to the United States Constitution. In addition, defendant Terry claims a spousal privilege against providing any information regarding his wife. This Court will discuss each of these claimed privileges in turn.

A. Claimed First Amendment Privilege

In their initial papers opposing plaintiffs' motion to compel, defendants relied primarily on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in asserting their claim of privilege under the first amendment. In that case, the Supreme Court held that a local chapter of the NAACP in Alabama could not be held in contempt for failure to comply with a court order to produce its memberships lists. On the record before the Court, the NAACP had shown that in the past, revelation of the identity of its members had exposed them "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Accordingly, the Court concluded that compelled disclosure of membership information was likely to affect adversely the NAACP's ability to pursue its collective effort to foster beliefs they have the right to advocate. *Id.* at 462-63. Against this showing, the Court weighed the substantiality of the state's interest in obtaining the membership lists. *Id.* at 463-64. The court was unable to perceive that the disclosure of membership lists had any substantial bearing on any of the issues in the case. *Id.* at 464. *Accord* *Gibson v. Florida Legislative Comm'n*, 372 U.S. 539, 550 (1963) (no semblance of a nexus shown between NAACP membership and subversive, illegal activities); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) (city cannot compel disclo-

sure of NAACP membership, because under the facts of the case, "the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote").

As set forth below, *NAACP v. Alabama ex rel. Patterson* and the cases that follow it are no help to defendants, and their Supplemental Memorandum adds nothing to their arguments. In their Supplemental Memorandum, defendants address only the question whether the first amendment protects financial information, including bank statements and cancelled checks, apparently conceding that invocation of the first amendment in response to plaintiffs' other discovery requests was improper. Second, the cases defendant rely on in their Supplemental Memorandum give no special first amendment protection against the disclosure of bank records. Rather, these cases require only that the analysis set forth by the Supreme Court in *NAACP v. Alabama ex rel. Patterson* be applied when a litigant claims a first amendment privilege against the production of bank records.

Thus, in *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980), the appellants, a tax protest organization and its leader, challenged a district court order for the production of all bank records relating to their accounts. The district court had refused to consider the appellants' claim of first amendment privilege, sustaining the government's objection on relevancy grounds to testimony concerning the negative effect of the requested discovery on the appellants' first amendment rights. The court of appeals held that the appellants had met their initial burden of making a prima facie showing of arguable first amendment infringement and remanded the case to the district court for a consideration of that claim. Once a prima facie first amendment claim is made out, the burden shifts to the government to show a rational connection between the disclosure and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling. *Id.* at 1094 (citing *Pollard v. Roberts*, 283 F. Supp. 248, 256-57 (E.D. Ark.) (three-judge court), *aff'd*, 393 U.S. 14 (1968) (per curiam)). *Accord*, *Baldwin v. Commissioner*, 648 F.2d 483 (8th Cir. 1981).

Defendants have in this case failed to make out a prima facie case of infringement of their first amendment rights by the requested discovery. In *NAACP v. Alabama ex rel. Patterson* the petitioners had placed in the record direct evidence of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Similarly, in *United States v. Citizens State Bank*, the appellants had presented to the district court declarations from members of the tax protest group detailing the adverse effects of the challenged I.R.S. summons on its organizational and fundraising activities. In contrast, the record in this case is totally devoid of any evidence that the requested discovery in any way implicates activities protected by the first amendment. Defendants have had ample opportunity—at the initial discovery conference, in their statement pursuant to local Civil Rule 46(e), in their papers opposing plaintiffs' motion to compel, at the August 3 oral argument and in their supplemental briefings—to raise such issues, but have failed to do so. Instead, defendants' counsel seeks to have the Court disallow the requested discovery on the strength only of the most general and vague assertions.

Even if defendants had met their burden of making out a prima facie case that the requested discovery implicated their first amendment rights, then plaintiffs have overcome that showing demonstrating a rational connection between the discovery and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling. The financial information sought by plaintiffs was put at issue by defendants themselves. At oral argument, defendants' counsel argued that defendant Terry "doesn't have a dime" and that the proposed sanctions for any prospective violation of the Court's order would therefore be penal in nature rather than coercive. Transcript of Hearing conducted May 4, 1988, at 55-56. Plaintiffs are therefore entitled to information regarding Terry's assets and the financial relationship between Terry and Operation Rescue. This discovery is directly related to questions put into issue by defendants; it promotes plaintiff-intervenor's interest in protecting the health and constitutional rights of its citizens, and it pro-

notes the government's interest in the administration of justice.

Furthermore, in no case has a court upheld a blanket first amendment claim of privilege to all discovery. In *NAACP v. Alabama ex rel. Patterson*, for example, the NAACP had voluntarily provided the names of all its directors and officers, wanting only to preserve the confidentiality of the rank and file membership. *Id.* at 465. Here by contrast, defendants have been entirely uncooperative with respect to plaintiffs' attempts at discovery.

The Court concludes, therefore, that defendants have failed to make a sufficient showing to justify their assertion of a first amendment privilege against the requested discovery.

B. Claimed Fourth Amendment Privilege

Defendants have failed to provide any authority for their assertion that the fourth amendment applies at all to discovery requests in a civil law suit. This Court shares the view of Judge Edelstein that:

[w]hen a subpoena duces tecum in a civil case is challenged, it would appear the protection sought resides in the Federal Rules of Civil Procedure, not the fourth amendment. . . . It strains common sense and constitutional analysis to conclude that the fourth amendment was meant to protect against unreasonable discovery demands made by a private litigant in the course of civil litigation.

United States v. International Business Machines, Corp., 83 F.R.D. 97, 102 (S.D.N.Y. 1979). Although expressing skepticism as to the applicability of the fourth amendment to civil discovery requests, Judge Edelstein declined to resolve the question, deciding instead that even if the fourth amendment did apply, its standard of reasonableness would be no more rigorous than that imposed by the federal rules. *Id.* at 103. Plaintiffs' discovery requests, which are narrowly focused on issues relating directly to the merits and to the remedy in the

underlying contempt motion, are without a doubt reasonable within the meaning of Rule 26, Fed. R. Civ. P.

The Court concludes, therefore, that defendants have failed to make a sufficient showing to justify their assertion of a Fourth Amendment privilege against the requested discovery.²

C. Claimed Fifth Amendment Privilege

The fifth amendment privilege against self-incrimination is a purely personal right available only to natural persons. A collective entity has no fifth amendment privilege, and it cannot be asserted by an individual custodian of the entity's records even if the act of producing documents of the entity would tend to incriminate the custodian of the records personally. *Braswell v. United States*, 108 S. Ct. 2284 (1988); *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944). Operation Rescue, which in its literature holds itself out as a distinct entity, which has at

2 The Court is at a loss to discover the relevance of *Katz v. United States*, 389 U.S. 347 (1967), or *Whalen v. Roe*, 429 U.S. 589 (1977), two cases cited by defendants. *Katz* involved the electronic eavesdropping without a warrant by the government on private conversations made from a phone booth. In *Whalen*, the Court rejected any suggestion that the fourth amendment would provide a source for any protectable privacy right in patients challenging a New York State program to maintain confidential records of people who were prescribed certain controlled drugs. 429 U.S. at 604 n.32.

Finally, *McSurely v. McClellan*, 426 F.2d 664 (D.C. Cir. 1970), also cited by defendants, can be of no help to them. The appellants in *McSurely* were being prosecuted for criminal contempt for their refusal to comply with a subpoena issued by a Senate Committee seeking membership information. On its facts, then, *McSurely* is hardly on all fours with the instant case. Moreover, the legal arguments put forward by the appellants in *McSurely* have no relation to the arguments put forward by defendants here. In *McSurely* the appellants argued that "the interplay of the First and Fourth Amendments requires that . . . judicial review of the legality of the subpoena must be available before criminal liability may attach to failure to comply." *Id.* at 669. There can be no question in this case that defendants and their attorneys have had ample opportunity to present their constitutional objections to the requested discovery before the civil sanctions provided for in Rule 37(a)(4) are imposed.

least five employees, a payroll, stationary and bank accounts, qualifies as a collective entity. See *Bellis v. United States*, *supra*, 417 U.S. at 96-97. To the extent that the record before the Court is meager as to the mechanics of Operation Rescue this lack is due to defendants' unwillingness to provide even the most basic information. Defendants cannot then turn around and benefit from their lack of cooperation. Accordingly, Operation Rescue cannot assert any fifth amendment privilege, nor can defendant Terry when acting as a representative of Operation Rescue.

But putting aside the question of the availability of the fifth amendment privilege to Operation Rescue as an entity, defendants have failed to establish the privilege as to the financial information of Operation Rescue, defendant Terry, or his family. The fifth amendment protects a witness from being compelled to disclose information that he reasonably believes might be used against him in a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 489 (1951). Where the incriminatory nature of requested information is not readily apparent, the witness must explain how the answer is incriminating. *United States v. Edgerton*, 734 F.2d 913, 919 (2d Cir. 1984). The burden is on the witness, *United States v. Rylander*, 460 U.S. 752, 759 (1983), who must establish the incriminating nature of the information sought on a question-by-question or document-by-document basis, e.g., *Brock v. Gerace*, 110 F.R.D. 58, 62 (D.N.J. 1986).

Defendants in this case have utterly failed to show how the financial information requested in plaintiffs' four document requests or how the deposition questions in areas of inquiry two or three might tend to incriminate them. The underlying contempt proceeding in this case are entirely civil in nature, and cannot therefore form the basis of any fifth amendment claim. Similarly, the actions mentioned in Mr. Tierney's affidavit, a civil RICO action and an antitrust suit, cannot form the basis of any claim of privilege, even if defendants had made a showing that the requested information would be relevant to these other proceedings.

Only the deposition questions in the first area of inquiry, that is, defendant Terry's activities during the period of the

Operation Rescue demonstrations in and around New York City, seem to the Court to pose any risk of incriminating Terry. The information, if disclosed, might assist in a prosecution against him for trespassing or disorderly conduct.

The Court concludes therefore, that defendants have failed to make a sufficient showing to justify their assertion of a fifth amendment privilege with respect to any of the outstanding document requests or areas of inquiry two or three. Defendant Terry may properly refuse to answer questions in the first area of inquiry. In the event Terry does invoke the privilege, however, an adverse inference will be drawn against him, provided that his refusal to answer is not the only evidence on a particular issue. *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977); *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976); *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987).

D. Claimed Fourteenth Amendment Privilege

Defendants argue that plaintiff-intervenor, the City of New York, as a state actor, in joining the private plaintiffs in their discovery requests, seeks to chill the exercise of their first amendment rights in violation of the fourteenth amendment. This claim, even assuming that it would be cognizable under the appropriate facts, depends necessarily on the request impinging on the first amendment rights of Operation Rescue or its members. As discussed above, plaintiffs' outstanding discovery requests are not barred by the first amendment. Accordingly, defendants' claim of fourteenth amendment privilege must fall as well.

E. Claimed Spousal Privilege

The court does not recognize defendant Terry's invocation of spousal privilege in refusing to answer questions regarding his wife's finances or involvement with Operation Rescue. In federal court, the parameters of spousal privilege are determined by state law. Rule 501, Fed. R. Evid. In New York, spousal privilege applies only to information that would not be exchanged but for the absolute confidence induced by the

marital relationship. N.Y. Civ. Prac. L. & R. § 4502(b) (1963); *Prink v. Rockefeller Center, Inc.*, 48 N.Y. 2d 309, 314, 398 N.E.2d 517, 520, 422 N.Y.S.2d 911, 914 (1979); *People v. Melski*, 10 N.Y.2d 78, 80, 439 N.E.2d 378, 381, 217 N.Y.S.2d 65, 67 (1963). This rule would clearly not apply to financial information, nor to Terry's wife's involvement in Operation Rescue.

The Court concludes, therefore, that Terry has failed to make a sufficient showing to justify his assertion of spousal privilege against the requested discovery.

F. Defendants' Cross-Motion for a Protective Order

In their cross-motion for a protective order, defendants seek to stay all discovery except with respect to the Court's subject-matter jurisdiction until twenty days following a ruling by the Court on defendants' cross-motion to dismiss. They also seek to have all discovery protected from disclosure in or use in any other action or proceeding. There is absolutely no basis for the relief sought. Defendants' reliance on *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268 (1988) is entirely misplaced, since that case involved discovery against nonparties. Defendants' arguments that Terry and Operation Rescue are not parties to the instant action are nothing short of astounding.

In *Howard v. Galesi*, 107 F.R.D. 348 (S.D.N.Y. 1985), Judge Kram refused to grant a protective order that would stay discovery pending the disposition of a motion to dismiss. Noting that courts require a strong showing of "good cause" before granting a protective order pursuant to Rule 26(c), Fed. R. Civ. P., and that the burden of establishing "good cause" rests with the party seeking the protective order, Judge Kram concluded that the defendant in that case had failed to meet his statutory burden. *Id.* at 350. Like Judge Kram, this Court declines to rule at this moment on defendants' motion to dismiss, but is not persuaded that the granting of that motion is inevitable. Furthermore, plaintiffs here are not on any fishing expedition, but attempting to discover information directly relevant to the underlying civil contempt

proceedings. Accordingly, there is no basis for defendants' request to stay discovery at this time.

Defendants have provided no authority for their request that any discovery be protected from disclosure in or use in any other action or proceeding. In fact, the issue is never raised in defendants' memorandum in support of the motion. As plaintiffs suggest in their reply, it appears that defendants' motivation in seeking a protective order is merely to prevent plaintiffs and courts in other jurisdictions from gaining access to public record information disclosed in this suit, and to require duplicative and costly discovery in those suits. This is not the type of "good cause" required by Rule 26(c) for the entry of a protective order.

Accordingly, defendants' cross-motion for the entry of a protective order is denied.

G. Costs and Fees on the Motions

Rule 37(a)(4), Fed. R. Civ. P., provides that if a motion to compel discovery is granted:

the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Having heard the parties on this issue and having entertained supplemental briefing, the Court has determined that defendants' opposition to plaintiffs' motion to compel was not substantially justified, and further that no other circumstances make an award of expenses unjust. Accordingly, the Court rules that plaintiffs may recovery from defendants or from defendants' counsel their reasonable expenses including attorneys' fees on the motion.

As set forth above, defendants' claims of first and fourth amendment privilege are entirely without merit. Their claims

of fifth amendment privilege are similarly baseless, with the exception of Terry's objection to the deposition questions regarding his activities during the period between April 26, 1988 and May 6, 1988. Plaintiffs, though, did not oppose that portion of defendants' fifth amendment claim. Defendants' motion for a protective order is likewise lacking in merit. For these reasons, plaintiffs are entitled to recover their reasonable costs incurred on all discovery motions.

Other circumstances strengthen plaintiffs' claim to recover their costs. Defendants' timing in raising their objections to plaintiffs' discovery, on the eve of Terry's scheduled deposition and five weeks after the deposition had been noticed, and then with insufficient documentation, could not have been calculated to have a greater delaying effect on plaintiffs' underlying contempt action. Especially after plaintiffs had consented to an adjournment of Terry's deposition to accommodate defendants, it appears heavy-handed for defendants to have raised their objections in the manner they did.

Assessing costs jointly and severally against defendants and their counsel is appropriate where, as here, defendants were acting upon advice of their counsel. It is abundantly clear from the transcript of defendant Terry's deposition that he was consulting closely with counsel in determining whether and how to answer the questions asked of him. This is not a case where counsel, endeavoring to cooperate with reasonable discovery requests, is saddled with an uncooperative and recalcitrant client.

It would serve no useful purpose in this case for the Court to attempt to apportion costs between defendants' respective counsel. Though one or another of defendants' counsel may be primarily responsible for having presented certain of defendants' manifold claims of privilege, each has put his name to all the papers submitted in opposition to plaintiffs' motion to compel, and neither has repudiated in any way his clients' behavior.

CONCLUSION

Defendants' objections to both the document requests and deposition questions based on the first, fourth and fourteenth amendments have no basis in fact or in law. Terry has not adequately substantiated his claim of privilege based on the fifth amendment with respect to the document requests. Nor have defendants adequately substantiated their objections to deposition questions in the second and third areas of inquiry. Terry's claim of spousal privilege is entirely without merit. Accordingly, this Court orders defendants to produce all documents requested in the outstanding document requests, and orders defendant Terry to answer those questions in the second and third areas of inquiry, set forth above.

Because the first area of inquiry does on its face implicate Terry's fifth amendment right against self-incrimination, the Court will not order Terry to answer questions regarding his activities between April 26, 1988 and May 6, 1988. However, an adverse inference in this civil action will be drawn against Terry as to any question he refuses to answer.

Because defendants have failed to provide any justification for the protective order they seek, their cross-motion for a protective order is denied. Inasmuch as defendants' position in this discovery dispute is not substantially justified and no other circumstances make an award of expenses unjust, plaintiffs may recover from defendants or from defendants' counsel the reasonable expenses incurred in obtaining this order, including their attorney's fees. Plaintiffs are directed to file with the Court within twenty (20) days of the date of this decision an application detailing their expenses, including their attorney's fees.

It is so ordered.

Dated: New York, New York
August 31, 1988

/s/ ROBERT J. WARD
U.S.D.J.

**Discovery Sanctions of \$16,142.75
Against Defendants and Their Counsel**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

New York State Nat'l Org. for Women, et al.

—v.—

Randall Terry, et al.

By Memorandum Decision dated August 31, 1988, this Court awarded costs, including reasonable attorneys' fees, to plaintiffs on their motion to compel discovery, pursuant to Rule 37, Fed. R. Civ. P. On September 20, 1988, plaintiffs filed with the Court and served by hand on defendants: (1) an application for costs and attorneys' fees totalling \$16,142.75; and (2) notice that any objections to plaintiffs' application were to be filed and served within ten days.

Defendants did not file objections to plaintiffs' application within the ten day period. The Court does not construe defendants' motion for reconsideration of the August 31 Memorandum Decision to be an objection to plaintiffs' application for costs and attorneys' fees, inasmuch as no reference is made in defendants' motion papers to plaintiffs' application and the only issues raised in defendants' papers relate to the merits of the Court's August 31 Decision. Upon its own review of plaintiffs' application, the Court finds that it is in all respects reasonable.

Accordingly, plaintiffs' application is granted. The Court directs plaintiffs to submit to the Judgment Clerk of this court, on or before October 19, 1988, a judgment against defendants and their counsel, A. Lawrence Washburn and Michael Tierney, jointly and severally, in the amount of \$16,142.75.

Submit judgment.

Dated: New York, New York
October 5, 1988

/s/ ROBERT J. WARD
U.S.D.J.

**Discovery Sanction Judgment of \$16,142.75
Dated October 11, 1988**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

88 Civ. 3071 (R.J.W.)

Filed October 12, 1988

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, THE CITY OF NEW YORK, et al.,

Plaintiffs,

—against—

RANDALL TERRY, OPERATION RESCUE,
THOMAS HERLIHY, JAMES LISANTE,

Defendants.

JUDGMENT

Plaintiffs' Application for Court-Awarded Attorney's Fees and Costs, filed September 20, 1988, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that plaintiffs recover of defendants and their counsel, A. Lawrence Washburn, Jr. and Michael Tierney, the sum of \$16,142.75. Defendants and their counsel are jointly and severally liable to plaintiffs for this sum.

Dated at New York, New York, this 11th day of October, 1988.

/s/ ROBERT J. WARD

Parties entitled to be notified:

Randall Terry
Operation Rescue
James Lisante
Thomas Herlihy

All defendants are represented by

Michael Tierney
A. Lawrence Washburn, Jr.
Joseph Secola
80 Pine Street
New York, NY 10007

Contempt Opinion
697 F.Supp. 1324 (S.D.N.Y. 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO CHOICE COALITION,

Plaintiffs,

—and—

CITY OF NEW YORK,

Plaintiff-Intervenor,

A-78a

—against—

RANDALL TERRY; OPERATION RESCUE; REV. JAMES P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious NAMES, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.



A-78b

OPINION

A P P E A R A N C E S

CENTER FOR CONSTITUTIONAL RIGHTS

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New York, New York 10012

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Attorneys for Defendants

WARD, *District Judge.*

Plaintiffs brought the instant motion for civil contempt pursuant to 18 U.S.C. § 401 and Rule 70, Fed. R. Civ. P., claiming that defendants had violated this Court's order prohibiting the blocking of access to medical facilities where abortions are performed. Defendants have cross-moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground that plaintiffs and plaintiff-intervenor lack standing to bring the action.

For the reasons that follow, plaintiffs' motion for civil contempt is granted and defendants' cross-motion to dismiss is denied.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and declaratory relief.¹ Defendants had organized and publicized

¹ The plaintiffs in the instant action are: New York State National Organization for Women; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights (RCAR); New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhat-

a week of protests called Operation Rescue to be carried out in the New York City area from April 30 until May 7, 1988.² According to the plan, protestors each day would converge on a facility at which abortions were performed an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause plaintiffs sought to enjoin defendants, for the duration of the planned Operation Rescue, from obstructing access to any facility at which abortions were performed in New York City ("the City") and the surrounding counties. Justice Cahn of the New York State Supreme Court, New York County, issued a first temporary restraining order on April 28, 1988. This order did not contain language specifically prohibiting the blocking of access to clinics.

It is undisputed that on May 2, 1988, Operation Rescue conducted a demonstration in front of a physician's office at 154 East 85th Street in Manhattan, where abortions are performed. Five hundred and three protestors sat on the sidewalk in front of the office for at least five hours, and the police arrested these 503 demonstrators for disorderly con-

tan); Ob-Gyn Pavilion; Center for Reproductive and Sexual Health (CRASH); VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Bill Baird, Director of the Bill Baird Institutes; Thomas J. Mullin, M.D., F.A.C.O.G., medical director of Eastern Women's Center; Rev. Beatrice Blair, chairperson of RCAR; Rabbi Dennis Math, Vice-President of RCAR; Rev. Donald Morlan, treasurer of RCAR; and Pro-Choice Coalition.

Plaintiffs have brought this action on behalf of themselves and on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk, and Westchester Counties. To date, the Court has taken no action to certify the putative class.

2 The defendants in this action are: Randall Terry; Operation Rescue; Rev. James P. Lisante; and Thomas Herlihy.

In addition, plaintiffs have named as defendants "John Does" and "Jane Does," intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of.

duct in blocking ingress to and egress from the office. Statement of Stipulated Facts, filed May 4, 1988 ¶ 1.

Justice Cahn held another hearing on the afternoon of May 2, 1988, in view of defendants' conduct at the demonstration earlier that day. At the conclusion of the hearing, Justice Cahn issued a second, modified temporary restraining order. *Id.* ¶ 2. This second order included an express prohibition against the blocking of access to facilities where abortions are performed.³

Operation Rescue conducted a demonstration on the morning of May 3, 1988, in front of a clinic at 83-06 Queens Boulevard, Queens, New York. Defendant Terry was present at the demonstration in a leadership capacity and was personally

3 The terms of Justice Cahn's May 2 Order are as follows:

. . . [I]t is hereby ORDERED that the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, acting in concert with them, and with notice of this order are:

- 1) enjoined and restrained in any manner or by any means from:
 - a) trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988,
 - b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that. In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site.

And it is further ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights.

Exhibit A, annexed to Order to show Cause, issued May 3, 1988.

served with Justice Cahn's order at approximately 9:00 a.m. The demonstration continued after Terry was served with the order. The police arrested several hundred demonstrators for blocking ingress to and egress from the clinic, and the sidewalk was cleared by approximately 11:45 a.m. *Id.* ¶¶ 3, 10.

On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed the action to this Court. This Court scheduled a hearing to be conducted in the late afternoon of the following day, May 4, 1988. Apparently, no demonstration was carried out on the morning of May 4.

After argument by the parties, this Court ruled on Wednesday evening, May 4, 1988, that it would adopt and continue Justice Cahn's May 2 order and would modify it by (1) adding coercive sanctions of \$25,000 for each day that defendants violated the terms of the order; and (2) requiring defendants to notify the City in advance of the location of any demonstrations, and providing that if such notice was not provided, defendants would be liable for the City's excess costs incurred due to the lack of notice ("the Order" or "the May 4 Order"). Defendant Terry received oral notice of this Court's action from his attorney on the evening of May 4. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.⁴

This Court signed the Order on the morning of May 5, 1988, and defendants' counsel moved the next day by order to show cause to vacate the Order of failure to comply with Rule 65(c), Fed. R. Civ. P. The motion to vacate was denied on May 6, and the Court of Appeals for the Second Circuit on the same day denied defendants' application to stay the Order pending expedited appeal. *Id.* ¶ 2.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The demonstrators blocked

⁴ Defendant Terry was personally served with a copy of the Court's order on the evening of May 5, 1988. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 1.

ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, "Operation Rescue" demonstrators returned to the same site where they had demonstrated on Monday, at 154 East 85th Street, Manhattan, blocking access to the office. *Id.* ¶ 4. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 5. Approximately 320 Operation Rescue demonstrators were arrested at the May 6 demonstration. *Id.* ¶ 7.

At no time after he received notice of the May 4 Order did defendant Terry direct demonstrators to obey the Order, nor did he at any time alter his prior written instructions to Operation Rescue participants that their goal must be to block access to abortion facilities. At the May 6 demonstration, defendant Terry did communicate to demonstrators the terms of the Court's Order. *Id.* ¶ 6. The City did not receive advance notice of the location of the demonstrations on May 5 or May 6. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 5.

On May 31, 1988, plaintiffs filed a motion for civil contempt against all defendants, pursuant to 18 U.S.C. § 401 and Rule 70, Fed. R. Civ. P. In their papers opposing plaintiffs' motion and in their cross-motion to dismiss, defendants present several arguments to support their contention that they cannot properly be held in contempt of this Court's May 4 Order or of Justice Cahn's May 2 Order prohibiting the blocking of access to abortion facilities. In their cross-motion to dismiss, defendants raise the issue of plaintiffs' standing to maintain this action. In addition, defendants have asserted, in connection with ongoing discovery disputes, that the instant proceeding is in fact in the nature of a criminal contempt action, not a civil contempt action. Therefore, defendants argue, they are entitled to certain procedural protections that they have not been afforded, and the action must be pursued by a disinterested prosecutor rather than by plaintiffs.

The Court concludes that defendants' arguments are without merit. Accordingly, the Court holds that defendants Operation Rescue and Randall Terry are jointly and severally liable for \$50,000 in civil contempt sanctions to be paid to plaintiff National Organization for Women. In addition, defendants Operation Rescue and Randall Terry are jointly and severally liable to plaintiff-intervenor the City of New York for the excess costs incurred by it due to the lack of advance notice of the location of the May 5 and May 6 demonstrations.

DISCUSSION

The Court will first take up the contempt issue, and will then discuss plaintiffs' standing to maintain this action.

A. Contempt

An individual who refuses obedience to a valid order is subject to both civil and criminal contempt penalties for the same acts. *United States v. Petito*, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982) (citing *Yates v. United States*, 355 U.S. 66, 74 (1957)); *Accord S.E.C. v. American Bd. of Trade, Inc.*, 830 F.2d 431, 439 (2d Cir. 1987).

In *In re Weiss*, 703 F.2d 653 (2d Cir. 1983), the Court of Appeals for the Second Circuit set forth the range of remedies available when a court is confronted with disobedience of an order. After setting forth the general proposition that "[a]cts of willful disobedience to clear and unambiguous orders of the court constitute contempt of court," *Id.* at 660, the court explained:

If the disobedient behavior is conduct of a continuing nature which the contemnor has the power to terminate, the court may choose to hold the contemnor in civil contempt and impose a sanction that is designed to coerce the contemnor to terminate his contumacious conduct. . . . If the court seeks to punish the contemnor for his past contumacy, it may treat the conduct as

criminal contempt and impose a jail term or a monetary fine as vindication of the court's authority.

Id. at 661.

The general principles distinguishing civil and criminal contempt are well established. "If the sentence of contempt is imposed for the coercive or remedial purpose of compelling obedience to a court order and providing compensation or relief to the complaining party, the contempt is civil in nature; if the sentence is unconditionally and punitively imposed to vindicate the authority of the court and not to provide private benefits, the contempt is criminal." *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 115 (2d Cir. 1988) (citing cases). Civil contempt sanctions serve two functions: to coerce future compliance with the court's order and to compensate the complainant for losses stemming from past noncompliance. *E.g.*, *In re Grand Jury Witness*, 835 F.2d 437, 441 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1602 (1988); *E.E.O.C. v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1183 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986).

1. *The Contempt Penalties Sought by Plaintiffs are Civil in Nature*

Defendants have argued in connection with discovery disputes in this case that the instant proceedings necessarily involve the imposition of criminal contempt sanctions. The Court will address the issue here because of its obvious relevance to the question whether contempt sanctions may properly be imposed. Defendants' argument essentially boils down to this: because these proceedings continue beyond the conclusion of the conduct complained of, defendants have no opportunity to cure their contempt and any sanction imposed is therefore punitive in nature.

Defendants' position is without merit. The prospective civil contempt penalty was imposed on defendants by this Court orally at the May 4 hearing. The Court had received uncontroverted evidence of disobedience of Justice Cahn's order, which when the case was removed had the same force as an

order of this Court. To encourage compliance with its own order the Court provided sanctions for any future, continuing noncompliance. Defendants had notice of the sanctions imposed and had ample opportunity to cure noncompliance prior to the demonstrations conducted on May 5 and May 6, 1988.

By necessity, the instant civil contempt proceeding has continued beyond the conclusion of the conduct complained of. In no way, though, does this circumstance transform the proceeding into a criminal contempt action. It is only after defendants' activities have concluded that the Court can make the factual determination whether a violation of its Order has occurred in spite of the prior threat of civil coercive sanctions. If the Court were to accept defendants' position, then its hands would be tied ever to enforce civil contempt sanctions.

Accordingly, the Court concludes that defendants' activities of May 5 and May 6, 1988, are subject to the civil contempt sanctions imposed by the Court during the May 4 hearing and incorporated into the written order signed May 5, 1988.⁵ Having determined that civil contempt sanctions are

⁵ Furthermore, any penalty imposed for any violation at the May 3 demonstration of Justice Cahn's May 2, 1988 order would be civil in nature, so long as the penalty was imposed for the purpose of compensating plaintiffs for losses caused by the complained-of conduct, and not for the purpose of vindicating the authority of the Court.

Defendants have argued that this Court lacks authority to punish pre-removal violations of Justice Cahn's May 2 order. The parties agree that some forum must be available to adjudicate the question whether defendants' May 3 demonstration violated the terms of that order. Defendants removed the action to this Court on the afternoon of May 3. The state court, then, cannot now provide a forum. According to the terms of the federal removal statute, after a case has been removed, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(e). Removal "halts all further proceedings in the state court." *Sands v. Geller*, 321 F. Supp. 558, 559 (S.D.N.Y. 1971). If a state court continues to act in spite of removal, any orders or decisions it renders are null and void. *United States ex rel. Echevarria v. Silbergliitt*, 441 F.2d 225, 227 (2d Cir. 1971). It follows ineluctably that this Court must have jurisdiction to adjudicate any

available against defendants, the Court must next decide, based on the undisputed facts, whether these sanctions should now be imposed.⁶

2. Plaintiffs Have Satisfied their Burden to Establish that Defendants Violated the Court's Order and are Subject to Civil Contempt Sanctions

If a party is to be held in civil contempt for failure to comply with an order of the court, the order must be "clear and unambiguous," the proof of noncompliance must be "clear and convincing," and the court must find that the party has not "been reasonably diligent and energetic in attempting to accomplish what was ordered." *E.E.O.C. v. Local 638*, *supra*, 753 F.2d at 1178 (quoting *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981)). It is not necessary to show that defendants disobeyed the court's order willfully. *Id.*

pre-removal violation of Justice Cahn's May 2 order. See *Colonial Bank & Trust Co. v. Cahill*, 424 F. Supp. 1200, 1203 (N.D. Ill. 1976) (federal district court enforced judgment entered by state court prior to removal). This is the only conclusion that gives any meaning to the provision of 28 U.S.C. § 1450 that "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

6 Ordinarily, a hearing is required before a court may award civil contempt sanctions. A court may not try disputed issues on the basis of conflicting affidavits. *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976). No hearing is required, however, where there are no material facts in dispute. *United States v. City of Yonkers*, Nos. 88-6178, -6184, -6188, -6190, slip op. at 5770 (2d Cir. Aug. 26, 1988) (need for plaintiffs to present evidence establishing defendants' contempt was obviated by undisputed representation that defendants had violated court's order); *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796, 797 (S.D.N.Y. 1962); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960, at 590 (1973). Accordingly, it is entirely appropriate for the Court to proceed on the basis of the facts stipulated by the parties.

a. *The Order is clear and unambiguous*

At the May 4 hearing, defendants argued that the description of prohibited activity in Justice Cahn's order was insufficiently clear and intruded on defendants' first amendment rights. The Court considered defendants' arguments at that time and rejected them. Transcript of Hearing, conducted May 4, 1988, at 46-50. Defendants have not persuaded the Court that it should now alter its prior conclusion.⁷ The terms of the Order are sufficiently clear to give a person of ordinary intelligence fair notice of what conduct is prohibited. *Cf.*, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (standard to be applied in assessing whether a statute or ordinance is unconstitutionally vague).

b. *Proof of noncompliance is clear and convincing*

Based on the undisputed facts stipulated to by the parties, plaintiffs have satisfied their burden of proving by clear and convincing evidence that on May 5 and May 6, 1988, defendants Randall Terry and Operation Rescue violated this Court's order prohibiting the blocking of access to and egress from abortion facilities within New York City and the surrounding counties.

Operation Rescue was clearly in violation of the Court's Order in planning and carrying out both the May 5 and May 6 demonstrations. Defendants' assertion that plaintiffs must, before Operation Rescue can be held in civil contempt, show that all of the organizations and individuals alleged to be part of Operation Rescue received actual notice of and violated the Court's order is entirely unsupported and manifestly unreasonable. Regardless of its legal form, Operation Rescue

⁷ Judge Lawrence W. Pierce of the United States Court of Appeals for the Second Circuit appears to share this Court's view that the terms of the Order are not impermissibly vague. In a summary decision denying a stay of this Court's May 4 Order pending appeal, Judge Pierce ruled that "[t]he district court's order permitting petitioners to exercise their rights of free speech, subject to certain defined time, place and manner restrictions, is continued in all respects." *Terry v. New York State Nat'l Org. for Women*, No. 88-8037, slip op. (2d Cir. May 6, 1988).

is a cohesive entity that organized and carried out a massive and elaborate series of demonstrations. The demonstrations were aimed at blocking access to facilities where abortions are performed, and they continued in the face of an Order issued by this Court, forbidding the blocking of access. Operation Rescue cannot now escape responsibility for its actions simply by declining to use the corporate form of organization. Operation Rescue is, accordingly, liable for civil contempt penalties for two days of noncompliance.

Defendant Terry, as leader and organizer of Operation Rescue, is liable for civil contempt sanctions for the May 5 demonstration by virtue of his failure to alter his instructions to Operation Rescue participants that their primary goal was to block access to abortion facilities. As leader of the organization and of the particular activities that were enjoined, defendant Terry had an affirmative duty to attempt to secure compliance from his rank and file. See *United States v. United Mine Workers*, 330 U.S. 258, 306 (1947) (president of union who organized and led illegal strike liable for both civil and criminal contempt sanctions in view of his role as "the aggressive leader in the studied and deliberate non-compliance with the order of the District Court") *Accord International Union, United Mine Workers v. United States*, 177 F.2d 29 (D.C. Cir.), cert. denied, 338 U.S. 871 (1949).⁸ Although defendant Terry does not concede that any instructions from him to demonstrators on the site of the May 5 or May 6 demonstrations would have been followed, Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 6, the inference is inescapable that Terry, in view of his leadership role in planning the prohibited conduct, after having received notice on the evening of May 4 of the contents of this

⁸ Defendants' arguments seeking to distinguish defendant Terry's position from that of John L. Lewis, who as president of the United Mine Workers was adjudged in contempt for leading union members in a strike that had been enjoined by court order, are entirely unpersuasive. Terry's personal involvement and leadership role in the enjoined activities are clear. If Terry's position is distinguishable, it is only in that he had a tighter control over the conduct of demonstrations at particular targeted sites than would have been possible for Lewis to exert over his membership, which was dispersed across the country in a nationwide job action.

Court's Order, had the opportunity to comply and either to halt any demonstration planned for the following day or to ensure that any demonstration was conducted in accordance with the Order issued by this Court.⁹ A fortiori, defendant Terry's direct and personal involvement in the May 6 demonstration places him in civil contempt of this Court's Order for his activities on that date.

c. Defendants were not reasonably diligent and energetic in attempting to comply

Finally, the Court finds that neither defendant Terry nor Operation Rescue was reasonably diligent and energetic in attempting to achieve compliance with the Order. Simply communicating to demonstrators the terms of the Order, as defendant Terry did at the May 6 demonstration, was in itself insufficient to purge Terry of contempt. Terry never altered

9 Defendant Terry argues that he cannot be held in contempt based on his May 5 activities because he had not at that time been personally served with a copy of the Court's May 4 Order. Personal service of an order upon a party to an action, however, is not required. Parties are charged with a duty to monitor the progress of their cases and to ascertain the terms of any order entered against them. *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 109 (2d Cir. 1987); *Perfect Fit Inds., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808-09 (2d Cir. 1981). Notwithstanding that actual notice of the terms of an order is not required to bind the parties to an action, defendant Terry has stipulated that he did receive actual notice, on the evening of May 4, of the terms of the Court's May 4 Order. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 1. Accordingly, no argument regarding insufficiency of process can protect Terry from civil contempt sanctions based on his activities of May 5, 1988.

Although defendants do not challenge the Court's authority to adjudicate a contempt of its May 4 Order based on activities occurring outside the territorial boundaries of the Southern District of New York, it is the Court's duty to ascertain its subject matter jurisdiction and any limitations thereon. See Rule 12(h)(3), Fed. R. Civ. P. It is undisputed that the Court has jurisdiction over the parties to this action. Where a court does possess jurisdiction over the parties, "the court has power to punish contemptuous acts committed beyond the court's territorial jurisdiction." 11 A. Wright & C. Miller, *Federal Practice and Procedure* § 2960, at 589-90 (1973); *Accord Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963) ("Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of where the violation occurred.").

his instructions to demonstrators that their goal was to block access to the facility, nor did he in any other way attempt to secure compliance. In fact, Terry's own arrest during the May 6 demonstration leads the Court to infer that by the most powerful example of his own conduct, defendant Terry continued to encourage noncompliance with the May 4 Order. The secretive nature of the daily demonstrations, in which the location of the planned action was kept a mystery from the participants themselves, gave ample opportunity to the organizers to halt or to alter the scope of each day's demonstration, up to the last minute, to achieve compliance with the Court's order.

3. *The Amount and Disposition of the Sanctions are Reasonable and Appropriate*

When imposing civil contempt sanctions for the purpose of coercing compliance with the court's order, a district court should consider the following circumstances: (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanction; and (3) the financial consequences of the sanction upon the contemnor and the consequent seriousness of the burden of the sanction upon him. *E.g.*, *In re Grand Jury Witness*, *supra*, 835 F.2d at 443; *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 110 (2d Cir. 1987). These factors are only guides to be used when and where they are appropriate. *In re Grand Jury Witness*, *supra*, 835 F.2d at 443. The district court has broad discretion to design a remedy that will bring about compliance. *Perfect Fit Inds., Inc., v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.), *cert. denied*, 459 U.S. 832 (1982).

After entertaining argument on the question of the appropriate amount of coercive sanctions, the Court determined that a rate of \$25,000 per day for any prospective noncompliance would be appropriate. Transcript of Hearing, conducted May 4, 1988, at 55-62. Defendants have in the interim pre-

sented no evidence to alter the Court's determination.¹⁰ Accordingly, the Court adheres to its view, embodied in its May 4 Order, that prospective fines of \$25,000 per day were appropriate to secure compliance with the Order.

At the May 4 hearing, the Court expressed its intention to make any civil contempt sanctions levied payable to plaintiffs. Such an arrangement would have the dual effect of compensating the parties harmed by disobedience to the Court's order and enhancing the coercive impact of the sanction to encourage compliance. Transcript of Hearing, conducted May 4, 1988, at 50-55.

At the hearing, defendants argued that such an order would be improper. They provided no authority at the hearing for this proposition, and have offered none in their papers. At the hearing, the Court, declining to resolve the issue on the spot, ruled that any civil contempt penalties levied against defendants were to be paid into the registry of the Court to be disbursed by further order of the Court. Having considered the matter, the Court concludes that there is no impediment to providing that coercive civil contempt fines be paid to plaintiffs, *e.g.*, *N.A. Sales Co. v. Chapman Inds. Corp.*, 736 F.2d 854 (2d Cir. 1984), and adheres to its prior determination that such a disposition of the penalty best accomplishes the purposes to be served by civil contempt sanctions.¹¹ Accordingly, the \$50,000 penalty, comprising

10 At the May 4 hearing, defendants' counsel, arguing that a rate of \$25,000 per day was excessive, asserted that defendant Terry "doesn't have a nickel." Transcript of Hearing, conducted May 4, 1988, at 56. Upon the Court's suggestion, defendants' counsel offered to provide an affidavit from Mr. Terry regarding his financial status. *Id.* at 56-57. Defendants have not provided such an affidavit. Where the contemnor has failed to present any evidence as to his financial resources, that failure is not to be charged against the complainant. *In re Grand Jury Witness*, 835 F.2d 437, 443 (2d Cir. 1987) (upholding a \$50,000 contempt penalty for a witness' failure to appear before a grand jury in violation of a court order), *cert. denied*, 108 S. Ct. 1602 (1988).

11 An alternative solution, which the Court believes defendants would not consider felicitous, would be for the \$25,000 daily fines to be paid into

coercive fines for violations on May 5 and May 6 of the Court's May 4 Order, are to be paid to plaintiff National Organization for Women.

The Court also included in its May 4 Order a provision that if defendants failed to give the City of New York advance notice of the location of any planned demonstration, defendants would be liable for the City's excess costs incurred due to the lack of notice. The Court included this provision after hearing argument and concluding that defendants' practice of keeping the planned demonstration sites a secret was not in itself a form of expression protected by the first amendment, created a special burden for the City and its residents and increased the likelihood that the City would be unable to protect the rights of its residents to have access to the targeted facility. By including this provision, the Court hoped to encourage cooperation between defendants and the City, and intended to increase the coercive impact of the prospective sanctions. In the exercise of its discretion to fashion a coercive civil contempt sanction, the Court concludes that the imposition of such a prospective penalty was appropriate. It is the duty of the Court to compensate a complaining party for damages caused by violation of an injunction. *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

4. *Defendants' Challenge to the Validity of the Underlying May 4 Order*

Defendants, in arguing against the imposition of contempt sanctions, raise several challenges to the propriety of the

the federal treasury, and in addition, for defendants to compensate plaintiffs for their losses stemming from defendants' noncompliance. Once a complainant has proved that he or she has suffered harm because of a violation of the terms of an injunction, compensatory damages are appropriate and the Court lacks authority to decline to impose sanctions. *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). Such compensation should include reasonable costs for prosecuting the contempt, including attorney's fees, if the violation is found to be willful. *Id.*

Court's May 4 Order. Defendants argue: (1) that the imposition of contempt sanctions upon them would violate their first amendment rights; (2) that entry of the May 4 Order was improper because plaintiffs had failed to demonstrate either irreparable injury or the inadequacy of legal remedies; (3) that the Order cannot be enforced because the security requirements of Rule 65(c), Fed. R. Civ. P., were not met; and (4) that relief is unavailable to a class that has not been certified. The Court is of the view that the collateral bar rule precludes defendants from challenging the validity of the underlying Order as a defense against the imposition of sanctions.

a. *Collateral bar*

The collateral bar rule is longstanding, and its purposes are clear.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). An order issued by a court with jurisdiction over the parties and the subject matter of an action must be obeyed unless and until it has been vacated or stayed, or until it expires by its own terms. See *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975). The appropriate avenue for relief, in the event a party believes an order has been improperly issued, is to seek a direct appeal. "A 'contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' " *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 441, n.21 (1986) (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)) *Accord United States v. Rylander*, 460 U.S. 752, 756-57 (1982).

Thus, in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the Supreme Court ruled that civil rights protesters, who had marched in Birmingham, Alabama in violation of a temporary injunction issued by a state court, could not litigate the validity of the underlying order in subsequent contempt proceedings. The Court recognized serious constitutional infirmities in the challenged order. Nevertheless, since the court that issued the order had jurisdiction over the parties and the subject matter of the action, since the order was not transparently invalid, and since the protesters had failed to take advantage of their opportunity to challenge directly on appeal the validity of the order, they were barred from attacking the order in the collateral contempt proceeding. *Id.* at 321.

Similarly, in the instant case, the jurisdiction of this Court over the parties or the subject matter has not been questioned. The Court submits that its Order is not transparently invalid, but rather was carefully crafted to protect defendants' first amendment rights. Finally, defendants had available to them the opportunity to challenge the order directly, as they did on May 6 before this Court and before the Court of Appeals for the Second Circuit.¹²

b. The merits of defendants' challenges to the underlying order

The exact parameters of the collateral bar rule have not been elaborated, and the Court lacks clear guidance on the scope of the rule from either the Supreme Court or the Second Circuit.¹³ Although the Court rejects defendants' argu-

12 It is appropriate to assess defendants' opportunity to challenge the propriety of the Order prohibiting them from blocking access to abortion facilities from May 2, 1988, when Justice Cahn first issued such an order.

13 The collateral bar rule has been limited in situations where there is no procedure available for effective review at an earlier stage, see *United States v. Ryan*, 402 U.S. 530, 532-33 & n.4 (1971) (distinguishing the situation in *Walker* from a collateral challenge in contempt proceedings of an erroneously issued subpoena duces tecum), and where compliance could cause irreparable injury, *Maness v. Meyers*, 419 U.S. 449, 460-63 (1975).

ment that they had no adequate opportunity to challenge the propriety of the Court's order in advance of these collateral proceedings, the Court recognizes that an honest difference of opinion may exist. Because defendants' challenges can easily be disposed of on the merits, the Court will address the merits of defendants' challenges to its May 4 Order.

First, defendants argue that the Order violates their first amendment rights. The Court heard lengthy argument on this very question on the evening of May 4 and issued an order specifically intended to protect defendants' first amendment rights. Defendants' abilities to present their views and to picket were in no way compromised by the Order. The only activity that was prohibited was the interference by defendants, and by those acting in concert with them, of the exercise by fellow citizens of their fundamental constitutional right to obtain an abortion. Such a prohibition does not threaten defendants' rights under the first amendment.

Defendants further argue that entry of the Order was improper because plaintiffs made an insufficient showing of irreparable injury and the inadequacy of legal relief. To the contrary, the parties had stipulated that defendants, by their actions, had successfully closed down medical facilities, had interfered with the fundamental constitutional rights of individuals attempting to use those facilities, and fully intended to continue to do so. *See generally* Statement of Stipulated Facts, filed May 4, 1988. Unrebutted affidavits submitted by plaintiffs detailed the irreparable physical and emotional harm experienced by a woman confronted by a demonstration that effectively blocks her access to a clinic where she has a scheduled appointment for an abortion or other family planning services. Affidavit of Thomas J. Mullin, sworn April 24, 1988 ¶¶ 5, 6, 9, 10; Affidavit of Jeannine Michael, sworn April 23, 1988 ¶¶ 5-8; Affidavit of William Rashbaum, Sr., sworn April 24, 1988 ¶¶ 3-6. At the May 4 hearing, the Court ruled that plaintiffs had made a sufficient showing of irreparable harm and the inadequacy of legal remedies, Transcript of Hearing, conducted May 4, 1988, at 45, and the Court adheres to that ruling today.

Defendants' assertion that the May 4 Order was invalid for failure to comply with the security requirements of Rule 65(c), Fed. R. Civ. P.,¹⁴ borders on the frivolous. Before the Court signed its Order on the morning of May 5, 1988, it added a provision requiring that plaintiffs post, prior to 5:00 p.m. on May 6, 1988, security in the amount of \$5,000. The amount of security to be given by an applicant for an injunction is a matter entrusted to the discretion of the district court, which may in the exercise of that discretion dispense entirely with the requirement where there has been no proof of likelihood of harm. *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir.), cert. denied, 417 U.S. 932 (1974); *Holborn Oil Trading, Ltd. v. Interpetrol Bermuda, Ltd.*, 658 F. Supp. 1205, 1211-12 (S.D.N.Y. 1987).

Defendants, in the course of the May 4 hearing, exceeding two hours in duration, failed to assert the need for security in any amount. The issue was then fully litigated on May 6, 1988, when the Court heard argument on defendants' order to show cause to vacate the May 4 Order.¹⁵ Furthermore, defendants cite no authority for their proposition that an order providing for the expeditious posting of security has no effect until that security has been actually posted. Such a proposition, if accepted, would render the Court powerless in innumerable situations where immediate equitable relief is required. Accordingly, the Court concludes that the security provisions ordered in this case were, under the circumstances, reasonable and satisfied the requirements of Rule 65(c), Fed. R. Civ. P.

Finally, defendants argue that the Court is without power to grant relief to a class that has not been certified. Quite to

¹⁴ Rule 65(c), Fed. R. Civ. P., provides in part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

¹⁵ But even at the May 6, 1988 argument, defendants presented no evidence of damages to support a claim that any particular amount of security was required. See generally Transcript of Hearing, conducted May 6, 1988.

the contrary, the applicable rule itself provides that "*as soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Rule 23(c)(1), Fed. R. Civ. P. (emphasis supplied). Clearly, it was not practicable for this Court to determine the appropriateness of class certification on May 4, 1988, when the case had been removed the day before and defendants were threatening to violate the Court's Order the next morning. Rather, the Court acted in the only reasonable manner it could under the circumstances, ruling on the continuation of Justice Cahn's temporary restraining order and leaving the question of class certification for another day. "[W]hen the determination of the class action issue is delayed, a suit brought under Rule 23 should be treated as a class action . . . until there is a determination that the action may not proceed under the rule." 7B. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1785, at 106-07 (1986).¹⁶ Moreover, since plaintiffs have standing to sue on behalf of their members and their patients, *see infra*, the scope of relief granted in this case was appropriate to afford relief to the named plaintiffs, even absent any class allegations.

B. *Plaintiffs' Standing to Maintain this Action*

Finally, the Court must consider defendants' assertion, on their cross-motion to dismiss, that plaintiffs lack standing to pursue the present action. Notwithstanding that defendants are precluded, by the collateral bar rule, from asserting this defense in an effort to avoid sanctions for their violation of the May 4 Order, the Court must resolve this issue in order to ascertain the propriety of its continued jurisdiction over this action.

Defendants assert that plaintiffs lack standing because none of the named plaintiffs:

¹⁶ *Zepeda v. United States Immigration and Naturalization Service*, 753 F.2d 719 (9th Cir. 1985), cited by defendants, is inapposite. In that case, the district court had denied certification of the class, *id.* at 722, and then granted class-wide relief, *id.* at 727.

is a woman who was scheduled to have an abortion performed in the N.Y. Metropolitan Area during the week of May 2-6, 1988, let alone a woman who was denied access to the three abortion facilities, one in Manhattan, one in Queens and one in Nassau County, where demonstrations occurred on May 2, May 3, May 5 and May 6.

Defendants' Memorandum, filed July 6, 1988, at 7. Such an allegation, however, is not required for plaintiffs to establish their standing to maintain the present action. Plaintiffs are a group of "several women's organizations suing on behalf of their members, and a class of clinics and abortion providers suing on behalf of themselves, their staff and patients." Plaintiffs' Memorandum, filed June 2, 1988, at 4; *See also* Complaint ¶¶ 1, 3-23.

Plaintiffs alleged in their complaint, which was filed April 28, 1988, that defendants were planning to block access to abortion providers in New York City and the surrounding counties from April 30 to May 7, 1988, but that defendants refused to state in advance which clinics they had targeted for their action. Complaint ¶¶ 2, 30, 34. Plaintiff organizations further alleged that their members included women who would need to use abortion and family planning clinics in New York City and the surrounding counties during the period of the planned actions by defendants. *Id.* ¶¶ 3-8, 23. Plaintiff health care facilities alleged that they provide abortion and other family planning services and are located within the geographic area of the planned action. *Id.* ¶¶ 9-17. The individual plaintiffs are either officers or directors of plaintiff organizations or of plaintiff health care facilities. *Id.* ¶¶ 19-22. For the purpose of ruling on a motion to dismiss for lack of standing, the Court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the plaintiffs. *E.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975).

1. Health Care Facility Plaintiffs

Abortion providers have standing to sue on behalf of their patients as well as themselves. *Planned Parenthood of Minne-*

sota, Inc. v. Citizens for Community Action, 558 F.2d 861, 865 n.3 (8th Cir. 1977). There is an intimate relationship between the provider and its patients, and the right of a pregnant woman to secure an abortion is inextricably bound up with the ability of the provider to offer the service. Moreover, the pregnant woman's ability to assert her own rights is beset with difficulties, rendering it particularly appropriate that a provider be permitted to assert the rights of its patients. *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 113-18 (1976) (plurality opinion)).

Accordingly, the Court concludes that plaintiff health care facilities and individual providers have standing to maintain this action. It can properly be inferred that plaintiff health care providers had patients scheduled for family planning procedures and consultations scheduled for the period of defendants' planned action. The imminent threat of disruption of those procedures provides the requisite case or controversy for plaintiffs to bring this action and for this Court to hear it.

2. Plaintiff Organizations

An organization has standing to sue on behalf of its members when three criteria are met: (1) its members would otherwise have standing to sue in their own right¹⁷; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Under the circumstances of this case, these three criteria are clearly met, and plaintiff organizations have standing to maintain this action on behalf of their members. Members who needed to use abortion and family planning clinics in

¹⁷ The organization must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972)).

New York City and the surrounding counties in the period from April 30 to May 7, 1988 were suffering a threatened injury as a result of the activities planned by defendants. These members faced the concrete threat that their appointments for abortions or other family planning services would be disrupted and would have to be rescheduled for some indefinite time in the future. The imposition of such a burden on the exercise of a woman's fundamental right to an abortion clearly creates the requisite case or controversy for this Court to hear the action. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-51 (1983) (invalidating city ordinance mandating 24 hour waiting period as an unwarranted burden on the right to obtain an abortion). Moreover, these women would be subject to the physical and emotional harm resulting from such forced rescheduling of their appointments.¹⁸ Defendants do not argue, nor could they, that protecting members' rights to secure an abortion is not germane to the purposes of plaintiff organizations. Similarly, there has been no argument made that individual women who were denied the right to obtain an abortion are indispensable parties to this action. Accordingly, the Court concludes that the requirements for organizational standing have been met, and plaintiff organizations may maintain this action.

3. *Plaintiff-Intervenor the City of New York*

Defendants also challenge the standing of plaintiff-intervenor the City of New York, citing *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976), for the proposition that a city's interest in enforcing the rights of its citizens is insufficient to grant the "personal stake" required for standing. Defendants, though, misread *Saxbe*. In *Saxbe*, the court applied to the issue of municipal standing the general rule on organizational standing. *Id.* at 698. The court denied stand-

¹⁸ The fact that no particular individual nor clinic could know in advance whether she or it would be targeted is due solely to the secretive nature of the planned activities. Defendants cannot use the uncertainty, created entirely by themselves, to their advantage to argue that no particular individual could in advance point to a certain threatened injury.

ing to the city because it had failed to allege any injury to its citizens. *Id.* In the instant case, by contrast, plaintiff-intervenor alleges in its complaint that defendants have "endanger[ed] the public security, safety and welfare of the City of New York and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed." Complaint of Intervenor-Plaintiff ¶ 15. This allegation is sufficient to confer standing on plaintiff-intervenor the City of New York.

CONCLUSION

Plaintiffs' motion for civil contempt is granted. Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of \$50,000. Plaintiff National Organization for Women is directed to submit to the Judgment Clerk of this Court, within ten days (10) of the date of this decision, a judgment against defendants Randall Terry and Operation Rescue, jointly and severally, in the amount of \$50,000. These funds are to be paid to plaintiff National Organization for Women and disbursed among the remaining plaintiffs according to its discretion.

Defendants Randall Terry and Operation Rescue are liable to plaintiff-intervenor City of New York for the excess costs incurred as a result of defendants' failure to notify the City in advance of the location of the May 5 and May 6 demonstrations. Plaintiff-intervenor is directed to serve on defendants and file with the Court a statement of these excess costs within twenty (20) days of the date of this decision. Defendants shall have ten (10) days from receipt of such statement to serve and file any objections to the reasonableness of the costs claimed. The relief granted herein is without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice.

Defendants' cross-motion to dismiss is denied.

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It is so ordered.

Dated: New York, New York
October 27, 1988

/s/ ROBERT J. WARD
U.S.D.J.

**\$50,000 Contempt Judgment Payable to Respondent
National Organization for Women Dated November 3, 1988**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (Ward, J.)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs,

—against—

RANDALL TERRY, et al.,

Defendants.

JUDGMENT

Plaintiffs' Motion for Civil Contempt, filed May 31, 1988, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that plaintiff National Organization for Women recover of defendants Randall Terry and Operation Rescue the sum of \$50,000. Defendants Terry and Operation Rescue are jointly and severally liable to plaintiff National Organization for Women for this sum.

Dated at New York, New York, this 3rd day of November, 1988.

/s/ ROBERT J. WARD
U.S.D.J.

Parties entitled to be notified:

Randall Terry
Operation Rescue
James Lisante
Thomas Herlihy

All defendants are represented by

Michael Tierney
A. Lawrence Washburn, Jr.
George Mercer
Joseph Secola
80 Pine Street
N.Y., N.Y. 10005

**\$19,141.00 Police Overtime Costs to
Respondent City of New York**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

New York State Nat'l Org. for Women, et al.

—v.—

Randall Terry, et al.

88 Civ. 3071 (RJW)

In its Opinion dated October 27, 1988, the Court adjudged defendants Randall Terry and Operation Rescue in civil contempt of court for their activities on May 5 and May 6, 1988. The Court directed plaintiff-intervenor the City of New York to serve on defendants and file with the Court a statement of the excess costs incurred as a result of defendants' failure to notify the City in advance of the location of the May 5 and May 6 demonstrations. Plaintiff-intervenor duly served and filed such a statement on November 17, 1988, claiming excess costs of \$19,141. Defendants were then given ten (10) days from receipt of plaintiff-intervenor's statement of costs to serve and file any objections to the reasonableness of the costs claimed.

Defendants' time to file objections has now expired without the filing of any objections. The Court has reviewed plaintiff-intervenor's statement of excess costs and finds it reasonable in all respects. Accordingly, plaintiff-intervenor the City of New York is directed to submit to the Judgment Clerk of this Court, on or before December 15, 1988, a judgment against defendants Randall Terry and Operation Rescue, jointly and severally, in the amount of \$19,141.

It is so ordered.

Dated: New York, New York
December 2, 1988

/s/ ROBERT J. WARD
U.S.D.J.

**\$19,141.00 Contempt Judgment to City of New York
Dated December 9, 1988**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

Filed December 9, 1988

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs,

—against—

RANDALL TERRY, OPERATION RESCUE,
THOMAS HERLIHY, et al.,

Defendants.

JUDGMENT

Plaintiff-Intervenor New York City's Application for Court-Awarded Costs, filed November 17, 1988, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that plaintiff-intervenor recover of defendants the sum of \$19,141.00. Defendants Randall Terry and Operation Rescue are jointly and severally liable to plaintiff-intervenor for this sum.

Dated at New York, New York, this 9th day of December, 1988.

/s/ ROBERT J. WARD
Robert J. Ward

Parties entitled to be notified:

Randall Terry
Operation Rescue
James Lisante
Thomas Herlihy

All defendants are represented by

Michael Tierney
A. Lawrence Washburn, Jr.
Joseph Secola
80 Pine Street
New York, NY 10007

**Preliminary Injunction Dated October 27, 1988
Oral Bench Ruling**

This is the decision of the court:

In this Circuit, the grant of preliminary relief is appropriate where the movant has established: (1) Irreparable harm, and, (2) either (a) the likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiffs' favor. *See, e.g., Mattel Inc. v. Azrak-Hamway International, Inc.*, 724, F.2d, 357, 359, (Second Circuit, 1983). Defendants dispute the adequacy of plaintiffs' showing of irreparable harm.

Having considered the record in this case, including testimony presented Tuesday, October 25, 1988, as well as testimony presented today, October 27, 1988, the court concludes that plaintiffs have met their burden of showing irreparable harm in the event the modified injunctive relief they request is not granted.

The court finds that a woman whose appointment for an abortion is cancelled suffers both emotional harm and physical harm. There is no dispute that the risk of the procedure increases with each passing week. If all the appointments scheduled at a particular clinic for a morning or portion of a day are suddenly cancelled due to the planned demonstrations, the court finds that the logistical difficulties would prevent at least some women from rescheduling their appointments for at least a week.

Some, who are far along in their pregnancy, have a limited number of alternative facilities from which to obtain treatment. Some are ignorant of their alternatives. Some are unable to afford their alternatives. Some have family or job commitments that would prevent them from rescheduling the procedure for a week. Some have traveled from other states or from Canada. These women would, incontrovertibly, suffer physical harm from the enforced delay. The risks from such a delay are especially severe when a woman is in her twelfth week or in her 24th week. A delay at the twelfth week

will require the patient to undergo the dilation and extraction procedure, which is more dangerous than the Dilation and Curettage procedure, which is available up to and including the twelfth week.

A delay in the 24th week will result in an absolutely loss of the woman's opportunity to choose an abortion. Plaintiffs' witness, Dr. Thomas Jay Mullin, testified that a full pregnancy and delivery presents greater health risks to a woman than an abortion performed even in the 24th week of pregnancy. The importance of timing is particularly acute, since many women do not know accurately how long they have been pregnant.

Other women are involved in two-day procedures. Dr. Mullin has given credible evidence that disruption of that procedure and delay in concluding the procedure increases risks to the patient, including, (1) infection, (2) the rupture of amniotic membranes, and, (3) spontaneous miscarriage. A spontaneous miscarriage can present a serious health threat, depending on where it occurs, and whether the woman has ready access to health professionals at the moment.

The abortion decision is a difficult one. The court finds that at the time a woman is making that decision, it would cause irreparable emotional harm to her to be denied access to her physician or counselor when she is confronted with vocal demonstrators challenging her right to make her decision, and particularly when those demonstrators block access to the premises.

Defendants assert that doctors at clinics do not maintain continuing relationships with their patients. However, two of the Operation Rescue demonstrations in May, 1988 were carried out at a private physician's office in Manhattan. The demonstration targets are not limited to large clinics. But even at the clinics, there are trained counselors on staff from whom these planned demonstrations would deny women access.

But even absent the ample evidence of physical and emotional harm, the court is of the view that interference with a woman's constitutional right to an abortion, even for as short a time as an hour or less, constitutes irreparable

injury—regardless of whether state action is responsible for that interference.

As the court ruled in its opinion rendered this date, plaintiff organizations and clinics have standing to assert the rights of their members and patients. The court finds that there are members and patients of clinics scheduled for abortion in New York City and surrounding counties during the period of the threatened demonstrations. Plaintiffs' inability to produce in advance an individual whose appointment will be cancelled is due solely to defendants' practice of withholding the location of the planned demonstrations.

Accordingly, the court concludes that plaintiffs are entitled to the modified preliminary relief they seek.

Submit order.

MR. MERCER: Will the court entertain a motion—I'm sorry, your Honor, I will withhold the motion until you finish.

THE COURT: An order has been handed up to the court, which I will now sign and time in at 3:45 p.m. on October 27, 1988.

* * *

**Preliminary Injunction Order
Dated October 27, 1988**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (R.J.W.)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, THE CITY OF NEW YORK, et al.,

Plaintiffs,

—against—

RANDALL TERRY, OPERATION RESCUE,
THOMAS HERLIHY et al.,

Defendants.

ORDER

UPON the testimony of witnesses for plaintiffs and defendants heard before this Court on October 25 and 27, 1988, the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the three statements of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on October 25 and 27, 1988, it is hereby

ORDERED that the order issued by Justice Herman Cahn on April 28, 1988, modified by Justice Cahn on May 2, 1988, and modified by order of this Court on May 4, 1988, is hereby again modified by order of this Court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are:

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties, on October 28, 29 and 31, 1988:

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, on October 28, 29, and 31, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with

actual notice of the provisions of this Order shall subject them to civil damages of \$25,000 per day for any violations of this Order; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the \$25,000 per diem amount ordered above, Operation Rescue or National Day of Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue or National Day of Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue or National Day of Rescue participants give the New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward
United States District Judge

Dated: New York, New York
October 27, 1988
3:45 P.M.

Summary Judgment Opinion dated January 18, 1989
704 F. Supp. 1247 (S.D.N.Y. 1989)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
and PRO-CHOICE COALITION,

Plaintiffs,

—and—

CITY OF NEW YORK,

Plaintiff-Intervenor,

—against—

RANDALL TERRY; OPERATION RESCUE; REVEREND JAMES
P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE
DOE(S), the last two being fictitious NAMES, the real
names of said defendants being presently unknown to

plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

OPINION

APPEARANCES

CENTER FOR CONSTITUTIONAL RIGHTS

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New York, New York 10012

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JOSEPH R. SECOLA, ESQ.
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of Counsel

Attorneys for Defendants

WARD, *District Judge.*

Defendants, a group committed to anti-abortion protests and individuals affiliated with the group, have moved, pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., to dismiss plaintiffs' amended complaint and plaintiff-intervenor's complaint. Plaintiffs, a coalition of women's organizations and abortion providers, have moved for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., and they seek a permanent injunction prohibiting defendants from blocking access to

medical facilities where abortions are performed. Plaintiff-intervenor, the City of New York ("the City"), has joined plaintiffs in their application for injunctive relief.

For the reasons that follow, defendants' motion to dismiss is denied, and plaintiffs' motion for summary judgment is granted.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and declaratory relief. Exhibit A, annexed to Petition for Removal, filed May 3, 1988 ("Plaintiffs' Complaint").¹ Defendants had organized and publicized a week of protests called Operation Rescue to be carried out in the New York City area from April 30 until May 7, 1988.² According to the

1 The plaintiffs in the instant action are: New York State National Organization for Women; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights (RCAR); New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; Center for Reproductive and Sexual Health (CRASH); VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Bill Baird, Director of the Bill Baird Institutes; Thomas J. Mullin, M.D., F.A.C.O.G., medical director of Eastern Women's Center; Rev. Beatrice Blair, chairperson of RCAR; Rabbi Dennis Math, Vice-President of RCAR; Rev. Donald Morlan, Treasurer of RCAR; and Pro-Choice Coalition.

Plaintiffs have brought this action on behalf of themselves and on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk, and Westchester Counties. To date, the Court has taken no action to certify the putative class.

For convenience and where the context permits, the Court will refer to plaintiffs, plaintiff-intervenor and the women on whose behalf they have brought this action, collectively, as "plaintiffs."

2 The defendants in this action are: Randall Terry; Operation Rescue; Rev. James P. Lisante; and Thomas Herlihy.

(Footnote continued)

plan, protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause plaintiffs sought to enjoin defendants, for the duration of the planned Operation Rescue, from obstructing access to any facility at which abortions were performed in New York City and the surrounding counties. Justice Cahn of the New York State Supreme Court, New York County, issued a first temporary restraining order on April 28, 1988. After hearing assurances from representatives of the New York Police Department that the authorities would be able to ensure access to any protest site, Justice Cahn declined to include in this first restraining order any language specifically prohibiting the blocking of access to clinics.

It is undisputed that on May 2, 1988, Operation Rescue conducted a demonstration in front of a physician's office at 154 East 85th Street in Manhattan, where abortions are performed. Five hundred and three protestors sat on the sidewalk in front of the office for at least five hours, and the police arrested these 503 demonstrators for disorderly conduct in blocking ingress to and egress from the office. Statement of Stipulated Facts, filed May 4, 1988 ¶ 1.

Justice Cahn held another hearing on the afternoon of May 2, 1988, in view of defendant's conduct at the demonstration earlier that day. At the conclusion of the hearing, Justice Cahn issued a second, modified temporary restraining order. *Id.* ¶ 2. This second order included an express prohibition against the blocking of access to facilities where abortions are performed.³

In addition, plaintiffs have named as defendants "John Does" and "Jane Does," intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of.

3 The terms of Justice Cahn's May 2 Order are as follows:

. . . [I]t is hereby ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons

Operation Rescue conducted a demonstration on the morning of May 3, 1988, in front of a clinic at 83-06 Queens Boulevard, Queens, New York. Defendant Terry was present at the demonstration in a leadership capacity and was personally served with Justice Cahn's order at approximately 9:00 a.m. The demonstration continued after Terry was served with the order. The police arrested several hundred demonstrators for blocking ingress to and egress from the clinic, and the sidewalk was cleared by approximately 11:45 a.m. *Id.* ¶¶ 3, 10.

On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed to action to this Court. This Court scheduled a hearing to be conducted in the late afternoon of the following day, May 4, 1988. Apparently, no demonstration was carried out on the morning of May 4.

whomsoever, acting in concert with them, and with notice of this order are:

- 1) enjoined and restrained in any manner or by any means from:
 - a) trespassing on, blocking obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988,
 - b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that. In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site.

And it is further ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights.

Exhibit A, annexed to Order to Show Cause, issued May 3, 1988.

After argument by the parties, this Court ruled on Wednesday evening, May 4, 1988, that it would adopt and continue Justice Cahn's May 2 order and would modify it by (1) adding coercive sanctions of \$25,000 for each day that defendants violated the terms of the order; and (2) requiring defendants to notify the City in advance of the location of any demonstrations, and providing that if such notice was not provided, defendants would be liable for the City's excess costs incurred due to the lack of notice. See Transcript of Hearing, conducted May 4, 1988, at 61-62, 65-66, 72-73 ("the May 4 Order"). Defendant Terry received oral notice of this Court's action from his attorney on the evening of May 4, and the Court signed the May 4 Order the following morning. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The demonstrators blocked ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, "Operation Rescue" demonstrators returned to the same site where they had demonstrated on Monday, at 154 East 85th Street, Manhattan, blocking access to the office. *Id.* ¶ 4. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of the Stipulated Facts, filed July 26, 1988 ¶ 5. Approximately 320 Operation Rescue demonstrators were arrested at the May 6 demonstration. *Id.* ¶ 7.

At no time after he received notice of the May 4 Order did defendant Terry direct demonstrators to obey the Order, nor did he at any time alter his prior written instructions to Operation Rescue participants that their goal must be to block access to abortion facilities. At the May 6 demonstration, defendant Terry did communicate to demonstrators the terms of the Court's Order. *Id.* ¶ 6. The City did not receive advance notice of the location of the demonstrations on May

5 or May 6. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 5.

On May 31, 1988, plaintiffs filed a motion for civil contempt against all defendants, pursuant to 18 U.S.C. § 401 and Rule 70, Fed. R. Civ. P. On July 6, 1988, defendants filed a cross-motion to dismiss the complaint. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), the Court adjudged defendants Operation Rescue and Randall Terry in civil contempt of the Court's Order for their activities during the May 5 and May 6 demonstrations. Defendants' cross-motion was denied. Accordingly, the Court entered on November 4, 1988 a judgment in the amount of \$50,000 payable to the National Organization for Women; and on December 9, 1988 judgment was entered in the amount of \$19,141 in favor of the City. Defendants have filed notices of appeal from both judgments.

In light of defendants' plan to conduct a National Day of Rescue at the end of October, see Exhibit B, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 ("Gundrum Aff."), plaintiffs, on October 7, 1988, sought modification of the Court's prior injunction, to cover the dates October 28, 29 and 31, 1988. At the conclusion of an evidentiary hearing conducted October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' application to this Court and to the Court of Appeals for a stay pending appeal of the October 27 Order was denied.

Notwithstanding the issuance of the modified injunction and the denial of the requested stay, defendants conducted two demonstrations on the morning of October 29, 1988 within the geographic area covered by the October 27 Order. From at least 8:00 a.m. until about 12:15 p.m. on October 29, approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York. Exhibits A, H & I, annexed to Gundrum Aff. From at least 8:00 a.m. until about noon on October 29, approximately 130 Operation Rescue demonstrators blocked access to

the Women's Pavilion clinic on Deer Park Avenue in Deer Park, Suffolk County, New York. Exhibits A & J, annexed to Gundrum Aff. Both clinics targeted on October 29 provide abortions and family planning counseling.

On October 26, 1988, in the midst of the evidentiary hearing on plaintiffs' application to modify the Court's injunctive order, defendants filed their second motion to dismiss. The motion has been adjourned repeatedly upon the consent of the parties.

Plaintiffs, on December 21, 1988, filed the instant motion for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City Area from January 12 to 14, 1989. These blockades have been planned in express retaliation for this Court's October 27 Opinion. *See Exhibit A*, annexed to Gundrum Aff. (Letter from Randall Terry (Nov. 16, 1988), urging participation in January blockades of "abortion mills" in New York City area in order to "face down" this Court). The briefing schedules for plaintiffs' summary judgment motion and defendants' pending motion to dismiss have been coordinated so that the Court may consider them together. On January 6, 1989, the Court heard oral argument on these motions.

In their motion to dismiss, defendants argue that plaintiffs and plaintiff-intervenor lack standing to pursue this action, and defendants challenge the sufficiency of the complaint with respect to each of the eight causes of action asserted therein. In their papers filed in opposition to plaintiffs' summary judgment motion, defendants argue that the complaint does not authorize the relief plaintiffs now seek, and that the appeals now pending in this case divest the Court of jurisdiction to entertain plaintiffs' motion for permanent relief.⁴

⁴ In addition to the two contempt judgments against them, defendants have filed notices of appeal from the Court's order compelling Randall Terry's deposition, the order assessing costs and attorney's fees in a discovery dispute, and the October 27 Order.

DISCUSSION

Because resolution of the jurisdictional question raised by defendants depends in part upon an analysis of plaintiffs' complaint, the Court will discuss together defendants' arguments with respect to the inadequacies of the complaint and the jurisdictional consequences of their appeal. It will then address plaintiffs' standing and consider the merits of plaintiffs' causes of action. Finally, the Court will assess the propriety of injunctive relief.

A. Jurisdiction of the District Court in Light of Defendants' Pending Appeals

As set forth above, plaintiffs filed their original complaint in this action in state court on April 25, 1988. In their complaint, plaintiffs expressly demand: (1) a declaratory judgment that defendants' activities violate the plaintiffs' rights to obtain and provide abortions; and (2) a "preliminary and permanent injunction" prohibiting defendants from blocking access to clinics or harassing persons entering or leaving clinics "from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called 'Operation Rescue,' whichever is later."⁵ Inasmuch as plaintiffs, in their complaint, expressly seek a permanent injunction, defendants' assertion to the contrary is startling to the Court.⁶ Moreover, in view

5 Upon obtaining leave of the Court, plaintiffs served an amended complaint on defendants September 14, 1988. The purpose of the amendments to the complaint was to clarify the change in court from state court to federal district court following defendants' removal of the case, and to clarify defendant Randall Terry's status as a defendant both in his individual capacity and in his representative capacity as president of Operation Rescue, an unincorporated association based in New York State. The amended complaint made no changes to the "Wherefore" clause of the complaint.

6 Defendants, in their papers, baldly assert that a permanent injunction is "not requested in Plaintiffs' Complaint or Amended Complaint or in their October 7, 1988 motion for modification of injunctive relief." Defendants' Memorandum, filed January 4, 1989, at 7.

Defendants do not challenge that the relief requested in plaintiff-intervenor's complaint authorizes plaintiff-intervenor to seek permanent injunctive relief.

of the undisputed facts setting forth a continuing pattern of blockades in and around New York City, the Court concludes that the activities planned for January, 1989 constitute an extension of prior activities begun in April, 1988. See Transcript of Hearing conducted January 6, 1989, at 27-28. Accordingly, there is no deficiency in the Complaint that would preclude the Court from ruling on plaintiffs' instant motion for summary judgment and a permanent injunction.

Defendants argue that plaintiffs have already been granted complete relief, and they characterize the Court's October 27 Opinion as a grant of summary judgment is plaintiffs. Defendants' Memorandum, filed January 4, 1989, at 6. Defendants assert that the Court's October 27 Opinion finally decided the merits of the controversy, and their appeals from the judgments entered pursuant to that Opinion therefore divest this Court of jurisdiction to consider the instant motion.

The Court is of the view that this argument rises or falls with defendants' argument regarding the scope of relief requested in the complaint. Defendants asserted when this Court issued its May 4 Order that plaintiffs had been granted complete relief, and that the May 4 Order was therefore properly construed as a final judgment. Transcript of Hearing conducted May 4, 1988, at 75. The May 4 Order was, to the contrary, only a preliminary order covering a short duration, in response to the immediate situation then before the Court. It did not grant the permanent relief requested by plaintiffs.⁷

It follows that the Court's October 27 Opinion cannot be construed as a final determination of the merits of the case. That decision determined only whether the terms of the May

7 Defendants' counsel, at the January 6, 1989 oral argument, explained that when he read the Complaint last April, he understood that the language seeking an injunction "from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called 'Operation Rescue,' whichever is later," was properly construed as being limited by the specific dates set forth. Subsequent events have made clear, however, that the "planned blockade called 'Operation Rescue' " continues for permanent injunctive relief. If indeed defendants' activities had not continued beyond May 7, 1988, this case would be moot and the May 4 Order might properly be construed as having granted complete relief.

4 Order had been violated and whether civil contempt sanctions were appropriate. The Court did address the merits of defendants' challenges to its May 4 Order, *see* October 27 Opinion, at 22-25, and decided the issue of plaintiffs' and plaintiff-intervenor's standing, *id.* at 26-30. A consideration of the propriety of the issuance of a temporary injunction, however, can in no way be construed as a final determination of the merits of a case. The portion of the October 27 Opinion discussing standing constituted a denial of defendants' motion to dismiss on that ground. It is axiomatic that the denial of a motion to dismiss is not an appealable order.

Since the filing of a notice of appeal divests the district court of jurisdiction only over those aspects of the case involved in the appeal, *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (*per curiam*), defendants' filing of a notice of appeal from the civil contempt judgments does not disable the Court from considering plaintiffs' application for final and permanent relief. Conceptually, the determination whether the May 4 Order was violated is entirely distinct from the question whether plaintiffs are entitled to a permanent injunction.

The contempt judgments are neither final orders under 28 U.S.C. § 1291, nor among the interlocutory orders from which appeal is permitted under 28 U.S.C. § 1292. If they are properly appealable at all,⁸ it is only pursuant to the collateral order doctrine.

"[S]ince [under the collateral order doctrine] there is no pretense that the appeal is from an order that finally terminates the litigation, there is no reason to treat the appeal as transferring the entire litigation to the court of

8 Plaintiffs challenge whether the contempt judgments are appealable. Addendum A to Plaintiffs' Reply Memorandum, filed January 5, 1989. The filing of a notice of appeal from an unappealable order does not divest the district court of jurisdiction over any aspect of a case. *Leonhard v. United States*, 633 F.2d 599, 610 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981). The Court, though, need not decide this question, for it has jurisdiction to decide the instant motions whether or not the contempt judgments were properly appealed.

appeals. Instead, the district court should have the same power to proceed as it enjoys pending frankly interlocutory appeals under 28 U.S.C.A. § 1292(a) or § 1292(b)"

Ore Chemical Corp. v. Stinnes Interoil, Inc. 611 F. Supp. 237, 240 (S.D.N.Y. 1985) (quoting 15 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3911 (1976), at 497).

It is well settled that an appeal from an interlocutory order granting or denying preliminary injunctive relief does not strip the district court of jurisdiction to hear the merits. *Thomas v. Board of Ed.*, 607 F.2d 1043, 1047 n.7 (2d Cir. 1973), *cert. denied*, 444 U.S. 1081 (1980). A fortiori, a judgment rendered in the enforcement of a preliminary injunction cannot operate to divest the district court of jurisdiction to reach the merits of the case. Accordingly, this Court retains jurisdiction over this case notwithstanding defendants' pending appeals.

Before proceeding to the merits, however, the Court will first address defendants' standing argument.

B. Standing

In their motion to dismiss, defendants renew their argument that plaintiffs lack standing to maintain this action. First, the Court reaffirms its earlier holdings on this issue. *See generally* October 27 Opinion, at 27-30. As a matter of law, plaintiff health care facilities may sue on behalf of their patients as well as themselves. *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) ("it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision") (plurality opinion); *Planned Parenthood Ass'n of Cincinnati, Inc., v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (clinic and its director had standing to assert rights of patients seeking abortions); *Planned Parenthood of Minnesota, Inc., v. Citizens for Community Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977) (clinic may sue on behalf of women patients seeking abortions); *Pilgrim Medical Group v. New Jersey State Bd. of Medical Examiners*, 613 F. Supp. 837, 848 (D.N.J.

1985) (same). Plaintiff organizations may sue on behalf of their members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The City of New York may sue on behalf of its citizens. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) (applying to the issue of municipal standing the general rule on organizational standing).

The Court, in its October 27 Opinion reviewed plaintiffs' complaint and plaintiff-intervenor's complaint, concluding that the allegations contained therein were sufficient to confer standing. Plaintiffs had alleged that they—and the women on whose behalf they are entitled to sue—were facing a realistic and immediate danger of suffering an injury caused by defendants and redressable by the Court. October 27 Opinion, at 27-30. Ordinarily, when ruling on a motion to dismiss for lack of standing, the Court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the plaintiffs. *E.g.*, *Warth v. Seldin*, *supra*, 422 U.S. at 501. However, in the present posture of the case, where defendants raise the standing issue in opposition to plaintiffs' summary judgment motion, plaintiffs must prove the allegations on which they are relying. *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1051 (2d Cir. 1976) (en banc), *cert. denied*, 434 U.S. 1034 (1978). *Accord Glover River Org. v. United States Dep't of the Interior*, 675 F.2d 251, 254 n.3 (10th Cir. 1982); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 526 (1st Cir. 1979).

Defendants argue that since none of the named plaintiffs were targets of blockades conducted in May 1988 or October 1988, they cannot demonstrate the kind of injury required to establish their standing. "Plaintiffs clearly have not alleged or shown any actual injury to themselves." Defendants' Memorandum, filed October 26, 1988, at 4.

Defendants misunderstand the standing requirement. In view of the nature of the relief requested, plaintiffs' standing depends not on their present ability to demonstrate actual injury, but on their ability to show that when they filed the action, they in fact faced the concrete threat of injury they have alleged. When the complaint was filed, plaintiff facili-

ties were potential targets of the planned demonstrations. Exhibit E, annexed to Gundrum Aff. There is no dispute that when defendants target a particular facility, they have been able to disrupt the facility and effectively shut it down. *E.g.*, Statement of Stipulated Facts, filed May 4, 1988 ¶ 1; Exhibit E, annexed to Gundrum Aff. These facts are sufficient to support plaintiffs' allegations that plaintiff facilities and their patients faced a concrete threat of injury when plaintiffs filed their complaint.⁹ The threat to the City's interest in ensuring the health of its citizens was likewise sufficiently concrete to confer standing on intervenor-plaintiff. The Court will not require plaintiff organizations to supply the names of members who had appointments scheduled at New York area clinics for the week of April 30 to May 7, 1988. Furthermore, in view of defendants' pattern of activity and demonstrations planned by defendants from January 12 through January 14 in New York City, plaintiffs' claims can in no way be considered moot.¹⁰

9 The fact that no particular individual or clinic could know in advance whether she or it would be targeted is due solely to the secretive nature of the planned activities. See Defendants' 3(g) Statement, filed January 4, 1989 ¶ 6 (Operation Rescue demonstrations "normally announced in advance for a particular city or metropolitan area without disclosure of the particular abortion provider or clinic"). Defendants cannot use the uncertainty, created entirely by themselves, to their advantage to argue that no particular individual could in advance point to a certain threatened injury. The threat of injury was sufficiently concrete to confer standing on plaintiffs.

10 In *Roe v. Operation Rescue*, No. 88-5157, slip op. (E.D. Pa. Dec. 19, 1988), Judge Newcomer dismissed as plaintiffs an individual abortion provider, National Abortion Rights Action League and several clinics that were not the subject of blockades conducted around Philadelphia during the week of July 4, 1988. *Id.* at 5-7. To the extent that the Pennsylvania Court and this Court reach different results on the issue of standing, the cases are not inconsistent. The two courts have been presented with different sets of facts. See, *e.g.*, Exhibit E, annexed to Gundrum Aff. (Operation Rescue literature, explaining that "New York City is one of the largest abortion capitals [sic] in the world . . . and the media hub of the free world").

(Footnote continued)

C. *The Merits*

Plaintiffs assert eight causes of action in the complaint. To grant plaintiffs' motion for summary judgment, the Court need only find that plaintiffs have established their entitlement to relief on at least one cause of action on the basis of undisputed facts. To grant defendants' motion to dismiss, the Court must conclude that on the basis of the pleadings, none of the plaintiffs' causes of action states a claim for relief under any set of facts. For convenience, the Court will consider both motions together.

A court may grant the extraordinary remedy of summary judgment only when it is clear both that no genuine issue of material fact remains to be resolved at trial and that the movant is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. In deciding the motion, the Court is not to resolve disputed issues of fact, but rather, while resolving ambiguities and drawing reasonable inferences against the moving party, to assess whether material factual issues remain for the trier of fact. *Knight v. U.S. Fire Inc. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-250 (1986)). While the party seeking summary judgment bears the burden of demonstrating the lack of material factual issues in dispute, *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9 (2d Cir. 1983), "the mere existence of factual issues—where those issues are not material to the claims before the court—will not suffice to defeat a motion for summary judgment." *Owens v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (*per curiam*).

Based on the allegations contained in plaintiffs' complaint and the facts before the Court, the Court has concluded that plaintiffs have established the requisite concrete threat of injury. The Court's conclusion has been borne out by subsequent events. Defendants have returned to the New York City area repeatedly, and have threatened to conduct further demonstrations in direct challenge to this Court's authority. Exhibit A, annexed to Gundrum Aff.; Exhibits 1 & 2, annexed to Plaintiffs' Notice of Filing, filed January 6, 1989.

Although the movant faces a difficult burden to succeed, motions for summary judgment, properly employed, permit a court to terminate frivolous claims and defenses, and to concentrate its resources on meritorious litigation. *Knight v. U.S. Fire Ins. Co.*, *supra*, 804 F.2d at 12. The motion then:

is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1 Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Once the moving party has demonstrated the absence of any genuine issue of material fact, the non-moving party must establish "specific facts showing that there is a *genuine issue for trial*." " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e), Fed. R. Civ. P.; emphasis supplied in *Matsushita*).

The Court's rule in deciding a motion to dismiss is more limited. It must accept as true the allegations in the complaint, *Heit v. Weitzen*, 402 F.2d 909, 913 (2d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969), and construe them liberally in plaintiffs' favor, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Rauch v. RCA Corp.*, No. 87-7472, slip op. at 6922 (2d Cir. Nov. 3, 1988). The complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote and citations omitted); *Rauch v. RCA Corp.*, *supra*, slip op. at 6922.

Plaintiffs, in their complaint, assert the following causes of action: (1) violation of civil rights guaranteed by N.Y. Civ.

Rights Law § 40-c (McKinney Supp. 1988) and N.Y. Exec. Law § 296 (McKinney 1982 & Supp. 1988); (2) public nuisance; (3) tortious interference with business relations; (4) trespass; (5) intentional infliction of emotional harm; (6) tortious harassment of patients; (7) false imprisonment; and (8) violation of 42 U.S.C. § 1985(3). Plaintiff-intervenor asserts a single cause of action, public nuisance.

1. *Plaintiffs' Claims under Section 1985(3)*

Because plaintiffs' eighth cause of action is founded on federal law, the Court begins with consideration of that claim. Plaintiffs allege that defendants' threatened actions violate 42 U.S.C. § 1985(3).

Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all facilities in the New York City area.

Plaintiffs' Complaint ¶ 59.

A cause of action under section 1985(3) has four essential elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971) (as explained in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29

(1983)).¹¹ In addition, where the alleged conspiracy is aimed at a right that is by definition only a right against state interference, such as first and fourteenth amendment rights, the plaintiff in a section 1985(3) action must, as a necessary element of his or her claim, prove that the conspiracy contemplated state involvement of some sort. *United Brotherhood of Carpenters & Joiners v. Scott*, *supra*, 463 U.S. at 831-34.

A conspiracy is within the scope of section 1985(3) only if it is motivated by some class-based, invidiously discriminatory animus. The Supreme Court has thus far declined to rule whether section 1985(3) reaches conspiracies directed against a class identified by a characteristic other than race.¹² It is clear, however, that the statute does not "reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities." *Id.* at 835-39 (emphasis in original).

11 42 U.S.C. § 1985(3) provides in part:

If one or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

12 *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836 (1983) ("close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans"); *Griffin v. Breckenridge*, 403 U.S. 88, 102 n.9 (1971) ("We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us.").

The majority opinion among lower federal courts is that a gender-based animus satisfies the conspiracy requirement of section 1985(3). *E.g.*, *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1105 & n.15 (D. Mass 1986); *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1218-19 (D.N.J. 1984). See generally Annot. *Applicability of 42 USCS § 1985(3) to Sex-Based Discrimination*, 46 A.L.R. Fed 342 (1980). This Court agrees, and holds that a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under section 1985(3).¹³ Defendants have admitted that their activities are targeted at women who choose abortion. Exhibit A, annexed to Affida-

13 The Court finds quite persuasive plaintiffs' analogy between defendants activities, seeking forcibly to prevent women from exercising their constitutional right to decide whether to terminate a pregnancy, and the organized actions of the Ku Klux Klan that inspired the 42nd Congress to enact section 1985(3). Plaintiffs' Memorandum, filed December 21, 1989, at 32-33

Moreover, the special protection accorded to women as a class under the equal protection clause of the fourteenth amendment, *e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), strongly suggests the propriety of recognizing a cause of action under section 1985(3) founded on a claim of gender-based animus.

Defendants argue that a section 1985(3) claim can be asserted only by persons who allege race-based animus. At the January 6, 1989 oral argument, defendants made reference to *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) and to *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987). See Transcript of Hearing conducted January 6, 1989 at 45-46. These cases, respectively, recognize a section 1981 claim brought by an Arab-American and a section 1982 claim brought by a Jewish congregation and some of its individual members. Even if these cases could properly be construed as limiting the respective causes of action to "racial" discrimination, they would not control the instant case. Sections 1981 and 1982 specifically guarantee to all persons the same rights "enjoyed by white citizens." Section 1985(3), on the other hand, prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The language of section 1985(3) contains no indication that it was intended to be limited to racial classifications. The difference between sections 1981 and 1982, on the one hand, and section 1985(3) on the other, are borne out upon examination of the legislative histories. Compare *Saint Francis College v. Al-Khazraji*, *supra*, 107 S. Ct. at 2024 (discussing history of section 1981) with *Griffin v. Breckenridge*, *supra*, 403 U.S. at 100-02 (discussing history of section 1985(3))

vit of Joan Gibbs (attached to Complaint). Plaintiffs, then have adequately pleaded and proved the first element of a 1985(3) claim, based on the undisputed facts.

Plaintiffs assert two separate violations of section 1985(3): one based on a conspiracy to infringe their right to travel, and the other based on a conspiracy to infringe their right to choose an abortion.¹⁴

a. *Right to Travel*

The right to travel includes the right to unimpeded interstate travel to obtain an abortion and other medical services. *Doe v. Bolton* 410 U.S. 179, 200 (1973). Plaintiffs have alleged a violation of their right to travel, and the undisputed facts established that defendants' activities obstruct access to medical facilities to women who have traveled from out-of-state. Transcript of Hearing conducted October 27, 1988, at 186-87.¹⁵ The stipulated facts submitted in connection with the demonstrations conducted in May of 1988 establish that defendants have committed the requisite overt act in furtherance of the conspiracy. *See generally* Statements of Stipulated Facts, filed May 4, 1988; July 19, 1988; and July 26, 1988. Defendants have repeatedly forcibly denied access to abortion facilities in the New York area, and they intend to continue

¹⁴ In addition, plaintiffs argue that defendants have violated section 1985(3) in conspiring to deprive them of their right to be free from gender-based discrimination, which is protected from private interference by section 40-c of the New York State Civil Rights Law. Because it is uncertain whether section 1985(3) reaches violations of rights protected by state law, *see, e.g., Traggis v. Saint Barbara's Greek Orthodox Church*, 851 F.2d 584, 588-90 (2d Cir. 1988) (acknowledging conflicts in earlier decisions and declining to resolve the issue), the Court will not reach this claim.

¹⁵ Defendants argue that the claim fails because a woman unable to gain access to a clinic may go elsewhere to obtain the medical care she requires. Defendants' Memorandum, filed October 26, 1988, at 8. This position can find no support in the law. Plaintiffs need not show that defendants' activities entirely thwart the protected interstate travel. Plaintiffs must show only that the exercise of the right was penalized. *E.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). *See also Griffin v. Breckenridge, supra*, 403 U.S. at 105-06 (plaintiffs would prevail on section 1985(3) claim upon showing that right to travel was "impaired").

to do so. Exhibit A, annexed to Gundrum Aff.; Exhibits 1 & 2, annexed to Plaintiffs' Notice of Filing, filed January 6, 1989. The injury element of plaintiffs' 1985(3) claim is made out simply by showing that defendants threaten to interfere with plaintiffs' exercise of their federally guaranteed right to travel. Because the right to travel is protected from purely private as well as from governmental interference, *e.g.*, *Griffin v. Breckenridge*, *supra*, 403 U.S. at 105-06 (citing cases), plaintiff are not required to prove state involvement in order to prevail on this claim.

Thus, plaintiffs have adequately pleaded and established by undisputed facts all the elements of a violation of section 1985(3) based on infringement of their right to travel.

b. *Right to Choose an Abortion*

Where a claim under section 1985(3) is based on a conspiracy to deprive plaintiffs of their right to privacy, the plaintiff must demonstrate state involvement. *United Brotherhood of Carpenters & Joiners v. Scott*, *supra*, 463 U.S. at 833. By blocking access to abortion clinics in large numbers and by refusing to notify the police of their next target, defendants have acted to render police officials incapable of securing women who choose abortion equal access to medical treatment. Such action by private persons satisfies section 1985(3)'s requirement for state involvement.

If private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th Amendment; the private persons would then have violated § 1985(3).

Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring). *Accord United Brotherhood of Carpenters & Joiners v. Scott*, *supra*, 463 U.S. at 840 n.2.¹⁶ It cannot be disputed that defendants'

¹⁶ Though not necessary to support their 1985(3) claim, plaintiffs have established an even greater level of involvement by state authorities in their

activities have the object of depriving women of their right to choose an abortion. The same uncontroverted facts that satisfy the overt act requirement in connection with plaintiffs' claim based on their right to travel, likewise meet the overt act requirement for this claim. Finally, defendants' actions threaten injury to the protected class of women seeking abortions.¹⁷

Since this Court has determined that plaintiffs are entitled to summary judgment on their section 1985(3) claim, it need not address in detail plaintiffs' pendent state law claims.¹⁸

conspiracy to deprive women of access to abortion facilities. At the October 29 demonstration in Dobbs Ferry, New York, defendants entered into an express agreement with police officers that no demonstrators would be arrested so long as they agreed to leave the site by noon of that day. Exhibits A & I, annexed to Gundrum Aff.

17 Defendants argue that they are entitled to further discovery on the issue of injury. Transcript of Hearing conducted January 6, 1989, at 37-38, 40. Defendants, however, presented no evidence in their papers opposing summary judgment that would bring into question the undisputed facts on the record. Absent a showing going beyond mere argument, and in view of the history of the case up to this point, the Court concludes that further discovery on the issue of injury is not required.

Defendants' own experts have testified that confronting an anti-abortion demonstration causes stress in a woman patient, Transcript of Hearing conducted October 25, 1988, at 53-54, 62-65, 94-95, 102, that interruption of a two-day abortion procedure causes increased medical risk, *id.* at 105, 129, and that the medical risks associated with an abortion increase with each passing week, *id.* at 116-17. See generally Transcript of Hearing conducted October 27, 1988, at 241-44 (decision of Court granting plaintiffs modified preliminary injunction). Moreover, the Court is of the view that any impediment to the exercise of a woman's constitutional right to choose and obtain an abortion constitutes irreparable harm, independent of any medical consequences, *Id.* at 244. See also *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-51 (1983) (invalidating city ordinance mandating 24 hour waiting period as an unwarranted burden on the right to obtain an abortion).

18 Because it was the subject of extensive argument by the parties at the January 6, 1989 oral argument, the Court will briefly address plaintiffs' fourth cause of action, sounding in trespass. Plaintiffs' Complaint ¶¶ 50-51.

Trespass is the interference with a person's right to possession of real property either by an unlawful act or by a lawful act performed in an unlawful manner. The act must be intentional and the damages a direct consequence

2. Public Nuisance

Plaintiff-intervenor has alleged that defendants' activities constitute a public nuisance in that they are "designed to, and hav[e] the effect of, endangering the public security, safety and welfare of the City of New York and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed." Complaint of Plaintiff-Intervenor, filed July 7, 1988 ¶ 15. A public nuisance:

consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to . . . interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

Copart Inds., Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172, 362 N.E.2d 968, 971 (1977) (citations omitted).

Although a private litigant must show special damages in order to be entitled to relief on a cause of action for public nuisance, *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334, 464 N.Y.S.2d 712, 721, 451 N.E.2d 459, 468 (1983), a governmental entity is not required to make such a showing. See, e.g., *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050-52 (2d Cir. 1985) (injunction

of the defendant's act. *Annutto v. Town of Herkimer*, 56 Misc. 2d 186, 190, 288 N.Y.S.2d 79, 85 (Sup. Ct.), *aff'd in part and rev'd in part*, 31 A.D.2d 733, 297 N.Y.S.2d 295 (1968), *appeal dismissed*, 24 N.Y.2d 820, 200 N.Y.S.2d 596, 248 N.E.2d 449 (1969) (followed in *Malerba v. Warren*, 108 Misc. 2d 785, 788, 438 N.Y.S.2d 936, 940 (Sup. Ct. 1981), *modified*, 96 A.D.2d 529, 464 N.Y.S.2d 835 (1983)). Defendants have repeatedly blocked the doorways to abortion facilities in the past, and threaten to block access to plaintiff facilities. A blockade is an intentional, unlawful act which clearly interferes with plaintiffs' right to possession of the facility. Damages to the target facility and to the women who attempt to use the facility are direct consequences of the blockade. Accordingly, plaintiffs have established the elements of their trespass claim based on the undisputed facts and are entitled to summary judgment on that claim.

obtained by State of New York on public nuisance grounds without any finding of special damages). The City is entitled to bring a nuisance action to protect the health of its citizens. *New York Trap Rock Corp. v. City of Clarkstown*, 299 N.Y. 77, 83, 85 N.E.2d 873, 877 (1949) ("municipal corporation . . . has the capacity and is a proper party to bring an action to restrain a public nuisance which allegedly has injured the health of its citizens").

Plaintiff-intervenor has pleaded and proved all the elements of its public nuisance claim. The right to obtain an abortion, and more generally, to have access to medical care, is a public right "common to all." It is undisputed that defendants' activities have the intended effect of shutting down clinics, which in turn causes delay or an absolute loss of a woman's ability to obtain an abortion or other medical services. Defendants, then, have interfered with the public's common right to obtain medical services, and have injured the health of a considerable number of persons. Moreover, defendants' activities have in the past and threaten in the future to obstruct vehicular and pedestrian traffic in violation of N.Y. Penal Law § 240.20 subd. 5 (McKinney 1980). Plaintiff-intervenor is therefore entitled to summary judgment on its claim of public nuisance.¹⁹

D. *The Propriety of Permanent Injunctive Relief*

Having determined that plaintiffs are entitled to judgment on the merits, the Court must consider the appropriate remedy. Plaintiffs seek a permanent injunction prohibiting defendants and those acting in concert with them from blocking

¹⁹ Plaintiffs assert a private right of action for public nuisance. Plaintiffs' Complaint ¶ 45. To support a private action for public nuisance, the complainant must establish special damages " 'of a different kind from that suffered by other persons exercising the same public right.' " *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334, 464 N.Y.S.2d 712, 721, 451 N.E.2d 459, 468 (1983) (quoting Restatements, Torts 2d, § 821C, Comment b). Because it is unclear at this time what special damages plaintiffs assert to support their cause of action for public nuisance, and because the Court has determined that plaintiffs are entitled to summary judgment on the basis of their section 1985(3) and their trespass claims, the Court declines to rule on plaintiffs' cause of action for public nuisance.

access to abortion facilities, and from harassing women who seek to use the facilities. They further seek the imposition of prospective civil contempt penalties.

1. *Injunctive Relief*

Once plaintiffs have demonstrated success on the merits, permanent injunctive relief is available if "there is no adequate remedy at law [and] the balance of equities favor[s] the moving party." *Galella v. Onassis*, 353 F. Supp. 196, 235 (S.D.N.Y. 1972), *aff'd in part and re'd in part on other grounds*, 487 F.2d 986 (2d Cir. 1973). *Accord Smithkline Beckman Corp. v. Proctor & Gamble Co.*, 591 F. Supp. 1229, 1235 (N.D.N.Y. 1984) ("the Court must . . . decide whether the balance of equities favors injunctive relief; and if so, what form it should take"), *aff'd without opinion*, 755 F.2d 914 (2d Cir. 1985); *Sierra Club v. Alexander*, 484 F. Supp. 455, 471 (N.D.N.Y.), *aff'd without opinion*, 633 F.2d 206 (2d Cir. 1980). Plaintiffs must demonstrate a real danger that the act complained of will actually take place. There must be more than a mere possibility of fear that the injury will occur. 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2942 (1973), at 369.

It is clear in this case that there is no adequate remedy at law. Plaintiffs cannot be compensated adequately with money damages for the interference with their right to choose an abortion. A woman who encounters a blockade while attempting to enter an abortion facility and is therefore unable to keep her appointment suffers irreparable physical and emotional harm. See note 17, *supra*.²⁰ The inability of local police officers to ensure access to targeted clinics in the face of defendants' blockades renders necessary the injunctive relief requested by plaintiffs.

20 There is no independent requirement that plaintiffs establish irreparable harm in order to be entitled to permanent injunctive relief. Rather, irreparable injury provides one basis for showing the inadequacy of any legal remedy. C. Wright & A. Miller, *Federal Practice & Procedure* § 2944 (1973), at 401 (quoted in *Buckingham Corp. v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985)).

Balancing the equities of the matter, the Court concludes that it is imperative to protect plaintiffs' right to choose an abortion and to obtain medical care at the targeted facilities. A carefully crafted injunction can accomplish this purpose without intruding upon defendants' first amendment rights to picket and to express their views.²¹ The public interest in ensuring the availability of health care supports the granting of injunctive relief.

The threat of future demonstrations in and around New York is real and concrete. Twice before, in May and October of 1988, defendants have followed threats of activities in New York with demonstrations that have shut down the targeted abortion facilities for several hours. Now they promise to return in greater force. The pattern of defendants' past activity, coupled with the planned demonstrations, leads the Court to the firm conclusion that plaintiffs face a real and immediate threat. In the exercise of its discretion,²² the Court has determined that permanent injunctive relief is appropriate in this case.

21 The Court notes that the injunction in this case is much narrower than the injunction recently upheld by the Ninth Circuit against a first amendment challenge. *Portland Feminist Women's Health Center v. Buhler*, 859 F.2d 681 (9th Cir. 1988). The only activities prohibited by this Court's order are the blocking of access to abortion facilities and physically abusing or tortiously harassing persons entering or leaving the facilities. The injunction upheld by the Ninth Circuit, as modified, prohibited all of the following acts: (1) obstructing the free and direct passage of any person in or out of the clinic; (2) demonstrating or distributing literature on the sidewalk in front of the clinic in a rectangular zone that extends from the clinic's front door to the curb and twelve and one-half feet on either side of a line from the middle of the clinic's door to the curb; (3) shouting, screaming, chanting, or yelling or producing noise by any other means, in a volume that substantially interferes with the provision of medical services within the Center, including counseling. *Id.* at 684, 687. A comparison can leave no doubt as to the reasonableness of this Court's injunction and the care it has taken to protect defendants' legitimate first amendment rights.

22 "Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2942 (1973), at 365.

2. Prospective Civil Contempt Penalties

In view of defendants' past non-compliance with the Court's injunctive orders and their stated intention to block access to clinics without regard to any order issued by the Court, the Court considers it necessary to impose prospective civil contempt penalties in order to enforce compliance with its injunction.

When imposing civil contempt sanctions for the purpose of coercing compliance with the court's order, a district court should consider the following circumstances: (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanction; and (3) the financial consequences of the sanction upon the contemnor and the consequent seriousness of the burden of the sanction upon him. *E.g., In re Grand Jury Witness*, 835 F.2d 437, 443 (2d Cir. 1987). *cert. denied*, 108 S. Ct. 1602 (1988); *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 110 (2d Cir. 1987). These factors are only guides to be used when and where they are appropriate. *In re Grand Jury Witness, supra*, 835 F.2d at 443. The district court has broad discretion to design a remedy that will bring about compliance. *Perfect Fit Inds., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.), *cert. denied*, 459 U.S. 832 (1982).

Plaintiffs seek prospective penalties against defendants and those acting in concert with them in the amount of \$25,000 per day, to be doubled for successive violations of the Court's order. In addition, plaintiff-intervenor seeks to recover excess costs incurred by it in the event Operation Rescue participants fail to give the New York City Police Department twelve hours' advance notice of the location of each day's demonstrations. Defendants argue that any penalties imposed should be merely nominal.

For the reasons stated in its October 27 Opinion, See October 27 Opinion at 16-19, the Court concludes that daily fines of \$25,000 are by no means excessive, and compensation to the City is entirely appropriate. On the other hand, in view of defendants' activities in May and October of 1988, in vio-

lation of similar injunctive orders containing like penalties, \$25,000 daily penalties may not be sufficient. Accordingly, the Court will impose a \$25,000 fine on any Operation Rescue participant who violates the Order with actual notice of its provisions, and this daily penalty shall be doubled for each successive violation of the Order. In addition, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescues participants' failure to provide the City with twelve hours' advance notice of the location of their demonstrations. Furthermore, in view of defendants' stated intention to make the enforcement of this Court's orders as costly as possible to plaintiffs, any Operation Rescue participant who knowingly violates the Order shall be liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order. In the event these penalties too fail to secure compliance of the Court's order, more severe penalties will have to be considered.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is denied. Plaintiffs' motion for summary judgment, joined by plaintiff-intervenor, is granted.

Permanent injunction issued January 10, 1989.

Dated: New York, New York
January 18, 1989

/s/ ROBERT J. WARD
U.S.D.J.

Permanent Injunction dated January 10, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs

THE CITY OF NEW YORK,

Intervenor-Plaintiff,

—against—

RANDALL TERRY, et al.,

Defendants.

ORDER

UPON the undisputed facts in this case, supported by the affidavits, exhibits, and three statements of stipulated facts, the summons and complaint, and all papers and proceedings herein, and counsel for all parties have appeared and argued before the Court on January 6, 1989, it is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other local organizations and persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue participants") are:

1. permanently enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are per-

formed in the City of New York, Nassau, Suffolk or Westchester counties;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties; Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject *him or her* to civil damages of \$25,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order; and

Upon application of the City of New York, it is further

ORDERED that in addition to the per diem amount ordered above, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue participants give the New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD

Robert J. Ward

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 10, 1989

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 88-7873, 88-7915, 88-7969, 88-9103, 89-7121

Filed NOV 7, 1989

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court-house, in the City of New York, on the 7th day of November one thousand nine hundred and eighty-nine.

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO CHOICE COALITION,

Plaintiff-Appellees,

CITY OF NEW YORK,

Plaintiff-Intervenor-Appellee,

—v.—

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE
DOES,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ TINA EVE BRIES

Tina Eve Bries

by Chief Deputy Clerk

Elaine B. Goldsmith
Clerk

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UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 88-7873, 88-7915, 88-7969, 88-9103, 89-7121

FILED SEP 20, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September, one thousand nine hundred and eighty-nine.

Present: HON. RICHARD J. CARDAMONE, *C.J.*
HON. GEORGE C. PRATT, *C.J.*
HON. MORRIS E. LASKER, *D.J.**
Circuit Judges,

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVEREND DONALD MORLAN; PRO CHOICE COALITION,

Plaintiffs-Appellees,

* Hon. Morris E. Lasker, U.S. District Judge, for the Southern District of New York, sitting by designation.

CITY OF NEW YORK,

Plaintiff-Intervenor-Appellee,

—v.—

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE
DOES,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of record
from the United States District Court for the Southern Dis-
trict of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered,
adjudged, and decreed that the Judgment of said District
Court be and it hereby is modified and as modified, affirmed
in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro,
Deputy Clerk

Statutes

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the pur-

pose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. § 1980.)

Respondents Complaint

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

Index No. 8315/88

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO-CHOICE COALITION,

Plaintiffs,

—against—

RANDALL TERRY; OPERATION RESCUE; REVEREND JAMES
P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE
DOE(S), the last two being fictitious names, the real
names of said defendants being presently unknown to
plaintiffs, said fictitious names being intended to desig-
nate organizations or persons who are members of defen-
dant organizations, and others acting in concert with any
of the defendants who are engaging in, or intend to
engage in, the conduct complained of herein,

Defendants.

COMPLAINT

The plaintiffs, by their attorneys, Joan P. Gibbs, David Cole, and Rhonda Copelon, all associated with the Center for Constitutional Rights with offices at 666 Broadway, 7th Floor, New York, New York, 10012, and Sarah E. Burns and Alison Wetherfield of the Now Legal Defense & Education Fund, 99 Hudson Street, New York 10013, and 1333 H Street NW, 11th Floor, Washington, D.C., 20005, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed to impending actions directly threatening the health and safety of hundreds of women seeking abortions or other family planning services in clinics and other facilities in New York State during the week of April 30, 1988 to May 7, 1988. Plaintiffs, who include organizations representing the affected women and a class of clinics and abortion providers in New York City, Nassau, Suffolk, and Westchester Counties, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and harassment of family planning clinics and abortion providers within the City of New York, Nassau, Suffolk, and Westchester Counties, by defendant organizations and individuals, and others acting in concert with them or on their behalf.

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision of abortion and other family planning services, and to intimi-

date, harass and restrain women attempting to use the services of the clinics. Defendants' actions are scheduled to take place in the City of New York and Nassau, Suffolk and Westchester Counties from April 30 to May 7, 1988, but defendants purposely have not indicated which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

PARTIES

Plaintiffs

3. Plaintiff, the New York State National Organization for Women (hereinafter "NY NOW"), is a membership organization with 10,000 members with offices at 90 State Street, Albany, New York 12207, and at 151 W. 74th St., NY, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

4. Plaintiff, the New York City Chapter of the National Organization for Women, is a membership organization with offices at 15 West 18th Street, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

5. Plaintiff, the National Organization for Women, is a membership organization with 160,000 members with offices at 1401 New York Avenue, N.W., Washington, DC 20005. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

6. Plaintiff, the Religious Coalition for Abortion Rights-New York Metropolitan Area (hereinafter "RCAR") is a coalition of organizations and individuals with offices at 198 Broadway, Room 805, New York, New York 10038. It sues on behalf of itself and its members, who include women with various religious beliefs who support the right to choose abortions and who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

7. Plaintiff, New York National Abortion Rights Action League, Inc. is a membership organization with offices at 2 West 64th Street, New York, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

8. Plaintiff, Planned Parenthood of New York City, Inc., is a membership organization with offices at 276 5th Avenue, Suite 808, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties from April 30 to May 7, 1988.

9. Plaintiff, Eastern Women's Center, Inc., is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

10. Plaintiff, Planned Parenthood Clinic (Bronx), is a health care facility that provides abortions and other family planning services, located in Bronx County. It sues on behalf of itself, its staff, and its patients.

11. Plaintiff, Planned Parenthood Clinic (Brooklyn), is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

12. Plaintiff, Planned Parenthood Margaret Sanger Clinic (Manhattan), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

13. Plaintiff, Ob-Gyn Pavilion, is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

14. Plaintiff, The Center for Reproductive and Sexual Health (CRASH), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

15. Plaintiff, VIP Medical Associates, is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

16. Plaintiff, Bill Baird Institute (Suffolk) is a health care facility that provides abortions and other family planning services, located in Suffolk County. It sues on behalf of itself, its staff, and its patients.

17. Plaintiff, Bill Baird Institute (Nassau) is a health care facility that provides abortions and other family planning services, located in Nassau County. It sues on behalf of itself, its staff, and its patients.

18. Plaintiff, Bill Baird, is director of the Bill Baird Institutes in Nassau and Suffolk counties. He sues on behalf of himself, his staff, and his patients.

19. Plaintiff, Thomas J. Mullin, M.D., F.A.C.O.G., is the medical director of plaintiff Eastern Women's Center. He sues on behalf of himself, his staff and his patients.

20. Plaintiff, the Reverend Beatrice Blair, is a minister associated with Saint Marks Church In The Bowery, and the Chair of RCAR. Saint Marks Church In The Bowery is located at 131 East 10th Street, New York, New York.

21. Plaintiff, Rabbi Dennis Math, is the Vice-President of RCAR, and the Rabbi for the Village Temple, located at 33 East 12th Street, New York, New York.

22. Plaintiff, the Reverend Donald Morlan, is the Treasurer of RCAR, and is associated with the American Baptist Churches of Metropolitan New York with offices at 322 8th Avenue, New York, New York.

23. Plaintiff, the Pro-Choice Coalition, is a coalition of organizations and individuals dedicated to assuring the constitutional right of women to choose abortion. It sues on behalf of itself and its members who are required to devote their resources to providing protection for women needing to use the services of planning clinics and abortion providers in the face of defendants' planned blockade.

Class Allegations

24. Plaintiff family planning clinics and abortion providers sue on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk and Westchester Counties. The class is so numerous that joinder of all members is impracticable. Common questions of law and fact predominate over any questions affecting individual members of the class. The claims of the representative clinics and providers are typical of the claims of the class. The representative clinics and providers will fairly and adequately protect the interests of the class. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

Defendants

25. Upon information and belief, defendant Randall Terry, acting in concert with other defendants and others unknown, is the Executive Director of Project Life and the National Organizer of "Operation Rescue," and resides in Windsor, New York.

26. Upon information and belief, defendant "Operation Rescue" (hereinafter "the Operation") is a group of organi-

zations and individuals, with offices in Binghamton, New York. Its purpose is to organize and coordinate disruptions of abortion and family planning facilities, including the blockades scheduled from April 30 to May 7, 1988 in the New York City area. The Operation's literature lists its address as P.O. Box 1180, Binghamton, New York 13902, and its telephone number as (607) 723-4012.

27. Upon information and belief, defendant Reverend James P. Lisante, acting in concert with the other defendants and others unknown, is one of the organizers of the blockades scheduled for April 30 to May 7, 1988 in the New York City area. He is the Respect Life Coordinator for the Diocese of Rockville Centre, New York.

28. Upon information and belief, defendant Thomas Herlihy, acting in concert with other defendants and others unknown, is an officer of the Prolife Nonviolent Action Project, and a co-sponsor of the Operation. He resides in the Bronx, New York.

29. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

30. The defendants, pursuant to a conspiracy that they have entitled "Operation Rescue," plan to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988 by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations of such facilities.

31. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

32. Upon information and belief, defendants in carrying out the Operation will be joined by approximately 1000 people from various parts of the country.

33. Defendants' own published plans for the New York Operation state explicitly that they intend to "close down abortion mills" in the New York City area, and specifically to "prevent abortion mill employees or pregnant mothers from entering" the clinics. Defendants' instructions to their co-conspirators acknowledge that they are likely to be arrested, and state that even if the police make arrests and seek to "disperse the crowd, the goal you must have is to keep the doorway occupied."

34. Defendants have not publicly stated which clinics in New York City the Operation will target. Upon information and belief, defendants intend to keep this aspect of the New York Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organizations intend to help protect and guarantee women's access to the facilities during the course of the Operation, but are frustrated in their attempts to do so by defendants' refusal to identify the targeted facilities.

35. Upon information and belief, upon their arrival in the City of New York, certain of the defendants will be staying at The Times Square Hotel at 255 West 43rd Street, New York, New York, and The Days Inn at 440 West 57th Street, New York, New York. Upon information and belief, others will be provided housing arranged by defendant Reverend James P. Lisante.

36. Plans for the New York Operation were first announced by defendant Randall Terry and certain other

defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May 1987. Ever since that time defendant Terry along with the other defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions," throughout the country.

37. On November 28, 1987, after an Operation "field training session" in Philadelphia, defendant Terry and certain other defendants conducted an all-day blockade of the Cherry Hill Women's Center in Cherry Hill, New Jersey. Upon information and belief, defendant Terry characterized this blockade as "a dry run for the first week in May . . . in New York City."

38. During the "dry run" in Cherry Hill, the doors to the Cherry Hill Women's Center were blocked by defendant Terry and other defendants for approximately nine and a half hours and over 200 people were arrested on trespass charges, which are still pending.

39. Participants in the trespass action at the Cherry Hill Women's Center, who came from various parts of the country, began gathering at the Cherry Hill Women's Center at approximately 6:00 a.m. and remained until 4:30 p.m., during which time they completely blocked all entrance to the Center, screamed and shouted at the women who had come to the Center for services, at the Center's staff, and at passersby, and damaged the front door and an outside speaker.

40. Thirty-eight women had appointments for abortions at the Cherry Hill Women's Clinic on November 28, 1987. As a result of the defendant Terry's and certain other defendants' activities, thirty-three of the women who had appointments for abortions that day could not be served. The other five women, who were in the middle of a two-day procedure, had to be treated by the Center's physician at an emergency alternative location.

41. On December 2, 1987, the Honorable Paul A. Lowen-grub of the Superior Court of New Jersey, Chancery Divi-

sion, Camden County, entered an interlocutory injunction against defendants Randall Terry, the New York Central Pro-Life Federation and others, enjoining them from, *inter alia*, "invading or trespassing upon the property known as 502 North Kings Highway, Cherry Hill, New Jersey, also known as the Cherry Hill Women's Center, (2) from gathering, parading, patrolling or picketing the premises of the plaintiff Cherry Hill Women's Center in such a manner as to disrupt, intimidate or harass the executive staff, employees or patients of the Cherry Hill Women's Center and (3) from intentionally interfering with the flow of traffic into and out of the Cherry Hill Women's Center's premises by blocking or obstructing ingress into or egress from same . . ." *Cherry Hill Women's Center v. John Does 1 to 500*, Civ. A. No. C-03654-87 (Sup. Ct. N.J. Dec. 2, 1987) (interlocutory injunction).

42. Defendants intend to replicate the Cherry Hill blockade each day of the New York Operation, at various clinics and abortion providers' offices in New York City and the surrounding counties. The Operation is intended to have and will have the effect of denying or disrupting women's access to the targeted clinics with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion significantly increases the health risks faced by the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

43. Plaintiffs have no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION

44. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

45. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York City and New York State, including New York Civil Rights Law, Section 40(c), and New York Executive Law Section 296.

AS AND FOR A SECOND CAUSE OF ACTION

46. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

47. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare of the City of New York, and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

AS AND FOR A THIRD CAUSE OF ACTION

48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

49. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' business.

AS AND FOR A FOURTH CAUSE OF ACTION

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

51. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

AS AND FOR A FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

53. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SIXTH CAUSE OF ACTION

54. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

55. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SEVENTH CAUSE OF ACTION

56. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

57. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and providers.

AS AND FOR AN EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

59. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discrimi-

natory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all facilities in the New York City area.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this action as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

2. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

- (a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities, from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called "Operation Rescue," whichever is later;

- (b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from April 30, 1988 to May 7, 1988, or the conclusion of blockade activities, whichever is later;

- (c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

(d) attempting or directing others to take any of the actions described in paragraphs (a), (b), and (c) above; and

(3) providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

(4) directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and conspiracy believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

(5) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ JOAN P. GIBBS

Joan P. Gibbs
Rhonda Copelon
David Cole*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

/s/ ALISON WETHERFIELD

Alison Wetherfield
NOW Legal Defense & Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

A-169

Sarah E. Burns
NOW Legal Defense & Education Fund
1333 "H" St. NW
Washington, DC 20005
(202) 682-0940

Attorneys for Plaintiffs

Dated: New York, New York
April 25, 1988

* Admitted to practice in Pennsylvania.

Respondent-Intervenor's Complaint
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
88 Civ. 3071 (RJW)

NEW YORK CITY NATIONAL
ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

—and—

THE CITY OF NEW YORK,

Intervenor-Plaintiff,

—against—

RANDALL TERRY, et al.,

Defendants.

COMPLAINT OF INTERVENOR-PLAINTIFF

Intervenor-Plaintiff, The City of New York, by its attorney, Peter L. Zimroth, Corporation Counsel of the City of New York, alleges:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief and damages arising out of activities which directly threaten the health and safety of women seeking abortions or other family planning services in clinics and other facilities in New York City. Plaintiffs and Intervenor-Plaintiff charge that defendants' actions infringe constitutional, statutory, and common law rights and create a public nuisance in the City of New York.

PARTIES

2. Intervenor-Plaintiff the City of New York ("the City") is a municipal corporation, duly organized and existing under the laws of the State of New York. The City intervenes in this action on behalf of itself and the people of the City pursuant to the New York City Charter § 394(c). The City has a vital interest in and responsibility for the general health and welfare of its citizens, including the responsibility for ensuring the continued availability and accessibility of quality reproductive health care for City residents. The City also has an important interest in keeping the peace, safeguarding its citizens, and ensuring the orderly conduct of business.

FACTS

3. In early April, 1988, defendants announced their intention to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988.

4. Defendants did not publicly state which clinics they planned to target. They kept this aspect of their operation secret in order to frustrate attempts by the police and others to protect and guarantee women's access to health clinics and abortion providers.

5. Plaintiffs, several women's organizations suing on behalf of their members, and a class of clinics and abortion providers suing on behalf of themselves, their staff and patients, brought this action by order to show cause in the Supreme Court of the State of New York on April 25, 1988. On April 28, State Supreme Court Justice Herman Cahn held a hearing on the order to show cause and issued a temporary restraining order enjoining the defendants from, *inter alia*, physically abusing or tortiously harassing persons entering, leaving, working at or using any services at any facility at which abortions are performed in the City of New York,

Nassau, Suffolk or Westchester Counties, from April 30 to May 7, 1988.

6. On the first day of the demonstrations, Monday, May 2, defendant Terry and approximately 600 other individuals acting in concert with him blocked access to an abortion provider's office at 154 E. 85th St. from approximately 8:00 AM to 1:15 PM. The police arrested 503 demonstrators, including Mr. Terry, but were unable to clear ingress and egress for over five hours.

7. On Monday afternoon, May 2, Justice Cahn expanded his April 28 order to bar defendants, or any other persons acting in concert with them, from "trespassing on, blocking, or obstructing ingress in to or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties, from May 2, 1988 to May 7, 1988,"

8. On Tuesday morning, May 3, defendant Terry and other individuals acting in concert with him, conducted another blockade at an abortion clinic at 83-06 Queens Boulevard, Queens. Mr. Terry was personally served a copy of the May 2 temporary restraining order at 9:00 AM at the scene of the blockade, but the obstruction continued. The police were forced to make 416 arrests, and access to the clinic was blocked until approximately 11:45 AM.

9. On Tuesday afternoon, May 3 at a third hearing before Justice Cahn, the City of New York was granted leave to intervene as plaintiff in this action. After the court had granted the City's oral application to intervene and in the middle of the hearing, defendants' counsel announced that he had removed the action to federal court and that it had been assigned to the Honorable Robert Ward.

10. On Wednesday evening, May 4, Judge Ward heard extensive argument, at the conclusion of which he continued and modified Justice Cahn's May 2 order. The modified order, signed Thursday, May 5, at 9:45 A.M., provided a \$25,000 fine for each day defendants continued to violate the

May 2nd state court order, and further ordered that if defendants failed to provide the City with advance notice of the location of the demonstrations, defendants would be liable to the City for the resulting costs.

11. On Thursday morning, May 5, defendants engaged in a blockade of the Women's Choice clinic at 17 W. John Street in Hicksville, Long Island. They blocked ingress in to and egress from the facility for over three hours. Four hundred and one persons were arrested. Upon information and belief, defendants and their associates had actual notice of this Court's order on Thursday morning, but continued the demonstration nonetheless. Randall Terry was quoted in the New York Daily News the following day as stating that "[a]ny court decision that supports abortion is tyranny and must be disregarded."

12. On Friday, May 6, defendants returned to 154 E. 85th St. in Manhattan. Defendants did not provide the City with advance notice of the location of this demonstration. They blocked ingress to and egress from the facility until approximately 8:45 A.M., when the police succeeded in clearing the entrance. Three hundred and fifteen persons were arrested.

13. Plaintiffs have no adequate remedy at law.

FOR A CAUSE OF ACTION

14. Intervenor-Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1 through 13.

15. Defendants' actions, jointly and individually, constituted a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare of the City of New York and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

WHEREFORE, Intervenor-Plaintiff demands judgment, together with costs, fees and disbursements of this action as follows:

1. Declaring that the actions of defendants constitute a public nuisance.

2. Granting Intervenor-Plaintiff a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

- a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities;
- b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York.
- c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;
- d) attempting or directing others to take any of the actions described in paragraphs (a), (b), and (c) above; and

(3) Providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

(4) Directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and all those working in concert with them not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

(5) Awarding damages to the City of New York commensurate with the amount expended by the City

because of defendants' failure to notify the City in advance of the site of their demonstration; and

(6) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 6, 1988

Respectfully submitted,

PETER L. ZIMROTH
Corporation Counsel of the
City of New York
100 Church Street 6-D-11
New York, New York 10007
(212) 566-0816

/s/ HILLARY WEISMAN

By: Hillary Weisman
Assistant Corporation Counsel

**Answer of Petitioners Randall Terry, Operation
Rescue and Thomas Herlihy**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (R.J.W.)

June 15, 1988

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO-CHOICE COALITION,

Plaintiffs,

—and—

CITY OF NEW YORK,

Plaintiff-Intervenor,

—against—

RANDALL TERRY, OPERATION RESCUE, REVEREND JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Defendants.

ANSWER

Defendants RANDALL TERRY, OPERATION RESCUE and THOMAS HERLIHY, by their undersigned attorneys, set forth their Answer to the Complaint in the above action as follows:

1. Denies the allegations of paragraph 1 of the Complaint.

2. Denies the allegations of paragraph 2 of the Complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 3 of the Complaint and deny the allegations of the second sentence of paragraph 3.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 4 of the Complaint and deny the allegations of the second sentence of paragraph 4.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 5 of the Complaint and deny the allegations of the second sentence of paragraph 5.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 6 of the Complaint and deny the allegations of the second sentence of paragraph 6.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 7 of the Complaint and deny the allegations of the second sentence of paragraph 7.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 8 of the Complaint and deny the allegations of the second sentence of paragraph 8.

9. Deny the allegations of paragraph 9 of the Complaint.

10. Deny the allegations of paragraph 10 of the Complaint.

11. Deny the allegations of paragraph 11 of the Complaint.

12. Deny the allegations of paragraph 12 of the Complaint.

13. Deny the allegations of paragraph 13 of the Complaint.

14. Deny the allegations of paragraph 14 of the Complaint.

15. Deny the allegations of paragraph 15 of the Complaint.

16. Deny the allegations of paragraph 16 of the Complaint.

17. Deny the allegations of paragraph 17 of the Complaint.

18. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 18 of the Complaint and deny the allegations of the second sentence of paragraph 18.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 19 of the Complaint and deny the allegations of the second sentence of paragraph 19.

20. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of the first paragraph 21 of the Complaint.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of the second paragraph 21 of the Complaint.

22. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 20 of the Complaint.

23. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 23 of the Complaint and deny the allegations of the second sentence of paragraph 23.

24. Deny the allegations of paragraph 24 of the Complaint.

25. Admit the allegations of paragraph 25 of the Complaint, except deny that defendant Randall Terry is acting in concert with defendants and others unknown.

26. Admit the allegations of paragraph 26 of the Complaint.

27. Admit that defendant Rev. James P. Lisante is the Respect Life Coordinator of the diocese of the Rockville Center, New York and otherwise deny the allegations of paragraph 27.

28. Admit the allegations of paragraph 28 of the Complaint, except deny that defendant Thomas Herlihy is acting in concert with other defendants and others unknown.

29. Deny the allegations of paragraph 29 of the Complaint.

30. Deny the allegations of paragraph 30 of the Complaint.

31. Deny the allegations of paragraph 31 of the Complaint.

32. Deny the allegations of paragraph 32 of the Complaint.

33. Admit the allegations of paragraph 33 of the Complaint, except deny that defendants have any "co-conspirators".

34. Admit the allegations of the first sentence of paragraph 34 of the Complaint, deny the allegations of the second sentence of paragraph 34 and deny knowledge or information sufficient to form a belief as to the truth of the

allegations of the third sentence of paragraph 34 of the Complaint.

35. Admit the allegations of the first sentence of paragraph 35 of the Complaint, and deny the allegations of the second sentence of paragraph 35.

36. Admit the allegations of paragraph 36 of the Complaint.

37. Admit the allegations of paragraph 37 of the Complaint.

38. Deny the allegations of paragraph 38 of the Complaint.

39. Deny the allegations of paragraph 39 of the Complaint.

40. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of the Complaint.

41. Deny the allegations of paragraph 41 of the Complaint except admit that an interlocutory injunction was entered by the New Jersey Superior Court on December 2, 1987 and refer to the order of the Court for the contents thereof.

42. Deny the allegations of paragraph 42 of the Complaint.

43. Deny the allegations of paragraph 43 of the Complaint.

44. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

45. Deny the allegations of paragraph 45 of the Complaint.

46. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

47. Deny the allegations of paragraph 47 of the Complaint.

48. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

49. Deny the allegations of paragraph 49 of the Complaint.

50. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

51. Deny the allegations of paragraph 51 of the Complaint.

52. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

53. Deny the allegations of paragraph 53 of the Complaint.

54. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

55. Deny the allegations of paragraph 55 of the Complaint.

56. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

57. Deny the allegations of paragraph 57 of the Complaint.

58. Defendants repeat and reallege as though fully set forth herein paragraphs 1-43 above.

59. Deny the allegations of paragraph 59 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

60. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

61. The plaintiffs' claims are barred, in whole or in part, by the First Amendment to the United States Constitution.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

62. Plaintiffs lack standing to assert the claims set forth in the Complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

63. Plaintiffs have not suffered any injury cognizable at law or inequity by reason of any of the actions complained of in the Complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

64. Plaintiffs' claims are barred, in whole or in part, be equitable principals of laches, estoppel and unclean hands.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

65. Plaintiffs' claims for injunctive relief are barred by the availability of an adequate remedy at law.

WHEREAS, defendants request judgment dismissing the Complaint as to them, awarding to them costs and disbursements of this action, and for such further relief as may be just and proper.

Dated: June 10, 1988

/s/ MICHAEL P. TIERNEY

Michael P. Tierney

A. Lawrence Washburn

Attorneys for Defendants

*Randall Terry, Thomas Herlihy
and Operation Rescue*

80 Pine Street

New York, New York 10005

(212) 701-3524

CERTIFICATE OF SERVICE

I hereby certify that the within Answer of Defendants Randall Terry, Operation Rescue, and Thomas Herlihy was placed in the mail, first class postage prepaid, and addressed to David Cole, Esq. on June 14, 1988.

/s/ MICHAEL P. TIERNEY

Michael P. Tierney

Answer and Jury Demand of Petitioner
James P. Lisante

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (R.J.W.)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-
NEW YORK METROPOLITAN AREA; NEW YORK STATE
NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.;
PLANNED PARENTHOOD OF NEW YORK CITY, INC.;
EASTERN WOMEN'S CENTER, INC.; PLANNED PARENT-
HOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC
(BROOKLYN); PLANNED PARENTHOOD MARGARET
SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE
CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP
MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO-CHOICE COALITION,

Plaintiffs,

—and—

CITY OF NEW YORK,

Plaintiff-Intervenor,

—against—

RANDALL TERRY, OPERATION RESCUE, REVEREND JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Defendants.

ANSWER AND JURY DEMAND

Defendant JAMES P. LISANTE, by his undersigned attorneys, sets forth his Answer to the Complaint in the above action as follows:

1. Denies the allegations of paragraph 1 of the Complaint.

2. Denies the allegations of paragraph 2 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 3 of the Complaint and denies the allegations of the second sentence of paragraph 3.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 4 of the Complaint and denies the allegations of the second sentence of paragraph 4.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 5 of the Complaint and denies the allegations of the second sentence of paragraph 5.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 6 of the Complaint and denies the allegations of the second sentence of paragraph 6.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 7 of the Complaint and denies the allegations of the second sentence of paragraph 7.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 8 of the Complaint and denies the allegations of the second sentence of paragraph 8.

9. Denies the allegations of paragraph 9 of the Complaint.

10. Denies the allegations of paragraph 10 of the Complaint.

11. Denies the allegations of paragraph 11 of the Complaint.

12. Denies the allegations of paragraph 12 of the Complaint.

13. Denies the allegations of paragraph 13 of the Complaint.

14. Denies the allegations of paragraph 14 of the Complaint.

15. Denies the allegations of paragraph 15 of the Complaint.

16. Denies the allegations of paragraph 16 of the Complaint.

17. Denies the allegations of paragraph 17 of the Complaint.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 18 of the Complaint and denies the allegations of the second sentence of paragraph 18.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 19 of the Complaint and denies the allegations of the second sentence of paragraph 19.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of the first paragraph 21 of the Complaint and admits the allegations of the second sentence of the first paragraph 21.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the second paragraph 21 of the Complaint.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 22 of the Complaint.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 23 of the Complaint and denies the allegations of the second sentence of paragraph 23.

24. Denies the allegations of paragraph 24 of the Complaint.

25. Admits the allegations of paragraph 25 of the Complaint except denies that defendant Randall Terry is acting in concert with defendants and others unknown.

26. Admits the allegations of paragraph 26 of the Complaint.

27. Admits that he is the Respect Life Coordinator of the Diocese of the Rockville Center, New York and otherwise denies the allegations of paragraph 27.

28. Admits the allegations of paragraph 28 of the Complaint except denies that defendant Thomas Herlihy is acting in concert with other defendants and others unknown.

29. Denies the allegations of paragraph 29 of the Complaint.

30. Denies the allegations of paragraph 30 of the Complaint.

31. Denies the allegations of paragraph 31 of the Complaint.

32. Denies the allegations of paragraph 32 of the Complaint.

33. Admits the allegations of paragraph 33 of the Complaint, except denies that defendants have any "co-conspirators".

34. Admits the allegations of the first sentence of paragraph 34 of the Complaint, denies the allegations of the sec-

ond sentence of paragraph 34 and denies knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 34 of the Complaint.

35. Admits the allegations of the first sentence of paragraph 35 of the Complaint, and denies the allegations of the second sentence of paragraph 35.

36. Admits the allegations of paragraph 36 of the Complaint.

37. Admits the allegations of paragraph 37 of the Complaint.

38. Denies the allegations of paragraph 38 of the Complaint.

39. Denies the allegations of paragraph 39 of the Complaint.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of the Complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 41 of the Complaint.

42. Denies the allegations of paragraph 42 of the Complaint.

43. Denies the allegations of paragraph 43 of the Complaint.

44. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

45. Denies the allegations of paragraph 45 of the Complaint.

46. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

47. Denies the allegations of paragraph 47 of the Complaint.

48. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

49. Denies the allegations of paragraph 49 of the Complaint.

50. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

51. Denies the allegations of paragraph 51 of the Complaint.

52. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

53. Denies the allegations of paragraph 53 of the Complaint.

54. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

55. Denies the allegations of paragraph 55 of the Complaint.

56. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

57. Denies the allegations of paragraph 57 of the Complaint.

58. Defendant repeats and realleges as though fully set forth herein paragraphs 1-43 above.

59. Denies the allegations of paragraph 59 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

60. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

61. The plaintiffs' claims are barred, in whole or in part, by the First Amendment to the United States Constitution.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

62. Plaintiffs lack standing to assert the claims set forth in the Complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

63. Plaintiffs have not suffered any injury cognizable at law or in equity by reason of any of the actions complained of in the Complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

64. Plaintiffs' claims are barred, in whole or in part, by equitable principles of laches, estoppel and unclean hands.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

65. Plaintiffs' claims for injunctive relief are barred by the availability of an adequate remedy at law.

JURY DEMAND

66. Defendant demands a trial by jury on all issues pursuant to Rule 38 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant requests judgment dismissing the Complaint as to him, awarding to him costs and disbursements of this action, and for such further relief as may be just and proper.

Dated: July 26, 1988

/s/ MICHAEL P. TIERNEY

Michael P. Tierney

A. Lawrence Washburn

Attorneys for Defendant

James P. Lisante

80 Pine Street

New York, New York 10005

(212) 701-3524

A-191

CERTIFICATE OF SERVICE

I hereby certify that copies of the within Answer and Jury Demand were served by hand on counsel for plaintiffs and plaintiff-intervenor on July 26, 1988.

/s/ MICHAEL P. TIERNEY

Michael P. Tierney

[illegible]

1. My name is Jeannine Michael and I am a social worker at the Eastern Women's Center (the "Center") which is a medical care facility in New York, N.Y. The Center provides pregnancy tests, abortions and other family planning services. The Center has been a frequent target of anti-abortion pickets, protests and vandalism and was bombed in October 1986.

2. My job at the Center is to offer individual counseling and support to any woman seeking an abortion who requests it and to all those women seeking abortions whom the personnel at the Center consider would benefit from talking about this major life decision. I have been doing this work since 1973. Over the years I have counseled thousands of women needing help and someone to talk to at this vulnerable time.

3. The Center is visited by about 200 women every day it is open for business. About 100 of these women have abortions there. Of these women, about 40% have abortions in the second trimester of pregnancy, that is, in the period of three to six months after their last menstrual period. The Center is the only clinic in New York City that will provide abortions as late as 24 weeks after the last menstrual period. About 10-15% of the women having second trimester abortions come to the Center from outside New York State.

4. I am aware of the announced plans of Operation Rescue to close down medical facilities providing abortion services in New York City and surrounding areas between April 30 and May 7, 1988 by blocking ingress to and egress from targeted

facilities. The Eastern Women's Center, which is one of the largest abortion care providers in New York City and the surrounding areas, is a possible target for this action.

5. Based on my years of experience working with abortion providers and women seeking abortions, I know that if the Center or any medical facility providing abortion services is forced by hostile action to close down for even one day, this closure will have an immediate and sometimes irreparable impact, practically and emotionally, on women wishing to come to the Center or other facility that day for abortion and family planning purposes.

6. If the Center is closed down for a day, I and all the Center staff will do our best to reschedule appointments as soon as possible and as soon as practicable for our clients. However, I know from my years of counseling work that enforced rescheduling may put substantial and sometimes insurmountable practical obstacles in the way of women seeking abortions and many of them may not be able to reschedule for days or weeks. For women in their twenty-fourth week of pregnancy, this would mean that abortion was no longer an available legal option. Many of our clients speak to me about the difficulties they have in taking time off work to come in for an appointment and many would be at risk of losing their jobs and their livelihoods if the Center had to cancel appointments on the day because the entrance to the Center was blocked and we had to ask these women to take another day off work to return. Many of our clients speak to me about their difficulties in making child care arrangements for their children when they come in for appointments; these difficulties would be compounded by having to make new arrangements at short notice. Many of our clients are extremely poor and can barely afford to travel, even on public transport, to the Center for their appointments. While the Center will always provide these women with money to get home after an appointment, we could not cover their expenses to come all the way back to the Center for a second appointment.

7. I know that the practical problems of a day's unexpected closure of the Center would be particularly acute for our out of state clients, whose travel, work, childcare and financial problems would be greater because they would be more difficult to resolve when some distance from home. Out of state clients who come to the Center for two day second trimester abortion procedures might have to stay an extra day in New York, at great expense, or go home and come back later, duplicating their substantial travel expenses.

8. Based on my years of work with women seeking abortions, I also know that denial of access to the Center by a mass demonstration would have a possibly devastating emotional impact on some of our clients, producing unnecessary emotional scars for women who have made a decision that abortion is the right thing for them. While encountering anti-abortion protesters only strengthens the resolve of some clients to exercise their right of reproductive choice, I have seen the composure of other women entirely shattered when they have been touched and obstructed by even a few people on their way into the Center. I know that the activity of hundreds of people in intentionally and illegally blocking access to the intimate and desired services the Center provides would be extremely emotionally distressing and harassing to our clients.

/s/ JEANNINE MICHAEL, M.S.W., C.S.W.
Jeannine Michael, M.S.W., C.S.W.

Sworn to before me this
23rd day of April, 1988

/s/ ALISON WETHERFIELD
Notary Public

ALISON C. WETHERFIELD
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-489-4057
Qualified in New York County
Commission Expires April 20, 1988

Respondent's Affidavit—Dr. Thomas J. Mullin
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index. No. 8315/88

NEW YORK STATE CHAPTER
NATIONAL ORGANIZATION FOR WOMEN, et al.,
—against— *Plaintiffs,*
RANDALL TERRY, et al.,
Defendants.

AFFIDAVIT OF DR. THOMAS J. MULLIN

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

THOMAS J. MULLIN, being duly sworn upon oath, deposes and says:

1. I am a physician and the director of the Eastern Women's Center.
2. I received an M.D. in 1979 and subsequently completed a residency in obstetrics and gynecology at Case Western University. From 1980-84 I was in practice in Cleveland, Ohio. Subsequently I practiced at a Kaiser Health Maintenance Organization in San Francisco, California and at San Francisco General Hospital. I was licensed to practice in New York in February 1988, and have been the director of the Eastern Women's Center since that time. I perform surgery in addition to administering the Center.
3. I have read the literature of "Operation Rescue" in which the groups announce that they plan to block access to various clinics during the week of April 30 to May 7, 1988.

4. I believe that our clinic will be a target of Operation Rescue. The basis for my belief includes the fact that our clinic has been the target of daily picketing for the past three years and that in the past three weeks the level of harassment at the entrance to the clinic has increased, presumably in preparation for Operation Rescue. Prior to the last three weeks there were two persons picketing per day at the entrance to the clinic. For the past three weeks there have been five persons per day outside the clinic and the level of harassment has escalated. They approach young women entering the building and, when they are within a few feet of them, shout such slogans as "Abortion is murder," "Twenty million Americans have been murdered in abortion clinics," "This place murders," and "Why are you going to kill that black baby." They stand in front of the narrow four-foot entrance to the building, blocking direct access and requiring people to step around them to enter the building. They have intimidated people entering the building, touching them and forcing literature into their hands, arms or handbags. When they see myself or another physician entering the building they shout epithets such as "There's the witch doctor," and "There's the murderer."

5. I am deeply concerned that people participating in Operation Rescue will block access to the clinic. This will present a serious health risk, as well as interfere with patients' ability to exercise their constitutional rights. Patients with pregnancies in an advanced state may be denied their right to choose because of the delays caused by Operation Rescue. In many circumstances, a delay of even a few days can cause significant additional health and safety risk to the patients, for the later in a pregnancy that a woman has surgery, the greater the danger.

6. The health risks are particularly acute for women undergoing second trimester terminations of pregnancy because the medical procedure spans two days. On the first day, a physician inserts a dilator which begins the process of termination of pregnancy. The woman leaves the clinic and returns the next day to have surgery after she is fully dilated. If a

woman is unable to enter the clinic on the second day because the access is blocked, the woman's health will be endangered. Once fully dilated, a woman who does not undergo the planned second-day surgery may have a spontaneous miscarriage and will have to be taken to the hospital emergency room for surgery. There are few if any doctors in New York who are fully familiar with and capable of performing this surgery. Normally, hospitals and other doctors refer these surgeries to our clinic. The patients will be placed at serious medical risk because few if any doctors are able to perform the necessary procedures.

7. The potential of such miscarriages also places the clinic in a situation of medical and legal liability. Physicians are unwilling to begin these surgical procedures if there is not a guarantee that they can be completed.

8. The clinic has hired additional security personnel for the week of the planned operations, but we cannot guarantee the safety and the health of the patients.

9. The Manhattan Kidney Dialysis Foundation is also in our building. They perform daily dialysis. If patients are unable to enter the building because of Operation Rescue, their lives are in danger. It is life-threatening for a kidney patient not to have daily dialysis.

10. Unless enjoined from blocking access to and otherwise interfering with our clinic's work, "Operation Rescue" will cause severe harm to our patients and staff as well as to the kidney patients upstairs.

/s/ THOMAS J. MULLIN

Thomas J. Mullin

Sworn to before me this
24th day of April, 1988

/s/ ALISON WETHERFIELD

Notary Public

ALISON C. WETHERFIELD

NOTARY PUBLIC, STATE OF NEW YORK

No. 31-489-4057

Qualified in New York County

Commission Expires April 20, 1988

Respondent's Affidavit—William Rashbaum Sr.

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

WILLIAM RASHBAUM SR., being duly sworn, deposes and says:

1. My name is William Rashbaum Sr. and I am a physician licensed in New York State and a Board certified obstetrician-gynecologist. I maintain an active obstetrical-gynecological practice in New York City and perform abortions for some of my patients. I have been working in obstetrics and gynecology since 1952. I am also an assistant clinical professor in the Department of Obstetrics and Gynecology at the Albert Einstein College of Medicine in New York City.
2. I am aware of the announced plans of Operation Rescue and other anti-abortion protestors to block ingress to and egress from targeted medical facilities providing abortion services in New York City and surrounding areas from April 30 to May 7, 1988.
3. Based on my years of obstetrical and gynecological practice and 18 years of performing abortions since reproductive freedom was legalized in New York State, I know that the closure, by hostile action without prior notice, of a medical facility providing abortion services for even one day can have very serious implications for the physical and psychological health of women with medical appointments at the facility that day.
4. For example, about 10% of all abortions in New York State are performed in the second trimester, that is, performed between thirteen and twenty-four weeks after the last menstrual period. The most common and safest method for

performing a second trimester abortion is known as "Dilation and evacuation," and involves the use of "Laminaria," a device which dilates the cervix. This safe, legal, medical procedure is performed over the course of two or three days. On the first and sometimes second day the laminaria are inserted. It is imperative that the procedure is finished on the following day. Once started it should not be reversed or halted. If there is delay in finishing the procedure, such as might be caused by the unexpected closure by hostile action for a day of the attending medical facility, the woman involved is at risk from possibly severe health complications, including endometritis, pelvic infection resulting in infertility, and even, in extreme cases, possibly death.

5. A closure of a medical facility providing abortion services for a day, forcing cancellation of appointments, can also cause serious psychological harm to clients. A continued pregnancy may be a source of great anguish to a woman, when she has made the decision to terminate the pregnancy. For example, I have performed abortions for women carrying fetuses which have genetic abnormalities which are incompatible with life. I know that for these women, delay in having the abortion would prolong their emotional suffering and compound it with anger at being prevented from exercising their right of reproductive freedom. Some of my abortion clients are minors, for whom delay may involve continued disruption of schooling, and continued emotional suffering from the stigma associated with their visibly pregnant states. Based on my years of work with women seeking abortions, I know that enforced delay of any woman's abortion can cause that woman psychologically damaging anger, anguish and emotional conflict.

6. The planned demonstrations by Operation Rescue may also have other serious implications for public health. It is very important for any medical procedure to be conducted in peace and quiet, without distractions for physician or patient, if the procedure is to take place in a safe and ethical manner. If access to medical facilities providing abortion services is not blocked but the demonstrators hold large and noisy dem-

onstrations outside, I believe that clinic personnel and women abortion clients inside the facilities will be upset, tense and angry, and the safety of the services provided will be impaired. Women clients who are harassed by crowds upon entry to the facility might hyperventilate because of tension, which could cause severe imbalance in blood gases which can have serious or catastrophic results. They might also be more prone to vasovagal syndrome (fainting) during the dilation of the cervix.

/s/ WILLIAM RASHBAUM

William Rashbaum, Sr., M.D. P.C.

Sworn to before me
this 24 day of April, 1988

/s/ ALISON WETHERFIELD

Notary Public

ALISON C. WETHERFIELD
NOTARY PUBLIC, STATE OF NEW YORK

No. 31-489-4057

Qualified in New York County
Commission Expires April 20, 1988

Respondent's Affidavit—Diane Straus

AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF CAMDEN)

DIANE STRAUS, being duly sworn deposes and says:

1. My name is Diane Straus and I am the Administrator at the Cherry Hill Women's Center at 502 Kings Highway North, Cherry Hill, New Jersey. The Center provides pregnancy tests, abortions and other family planning services. The Center has been a frequent target of anti-abortion protests and occasional vandalism.

2. On November 28, 1987 when I arrived at the Center, at approximately 7:00 a.m., the doors to the Center were blocked by 300 to 350 anti-abortion protestors, from various parts of the country, singing, praying and screaming at people who attempted to enter the building. They remained at the Center until 4:30 p.m.

3. According to newspaper reports, the protests at the Center were organized by Randall Terry and others associated with Operation Rescue and were staged as a "dry run" to the planned Operation Rescue in New York City from April 30 to May 7, 1988. See Exhibits A, B, C, D, attached hereto. Three hundred of the protestors were arrested by local police and charged with trespass. A list of those arrested is attached hereto as Exhibit E.

4. Thirty-eight women had scheduled appointments for abortions on November 28, 1987. As a result of the Center's doors being blocked, we were unable to see any patients that day. One of the patients whose appointment was rescheduled had to obtain a new referral form from her insurance provider, Health Care Plan in order to use her insurance for her rescheduled appointment. This involved increase delay and

inconvenience, as she had to see her doctor and get rescheduled with us. We assume that the other patients experienced delays as well since it was unlikely that another facility would see them that day and the earliest we could accommodate them was the following Wednesday. Even this short delay could put a woman into her second trimester requiring a more extensive two day procedure and increasing stress and medical risks.

5. Five women who had scheduled appointments for the November 28, 1988 were treated by our physician at an alternative location. Among the five women treated at the alternative site were four who had started a 2-day procedure which had to be completed on the 28th. We other members of the Center staff and myself, met these women at a Texaco station on the corner and had a counselor stay with them until arrangements were made to drive them to the alternative facility. It was imperative that they complete the 2-day procedure, so they had to endure the harassment of protestors who came to the Texaco station to use and control access to the public telephone, bathroom, etc.

6. The Center provides pregnancy tests on Saturdays. Because we were unable to enter the building, women were unable to receive pregnancy tests that day were unable to do so. One test was given for a woman who returned at 4:30 PM, after the normal closing hours of the Center.

7. The protesters were able to identify patients as they arrived and approached the cars yelling "Don't let them murder your baby!" If I or a staff member approached a patient in order to give her instructions the protesters would typically place their bodies between us and scream, with their face inches from ours or the patient's, "Look at her, see the evil in her eyes! See Satan in her eyes! Don't let her kill your baby, she only wants your money! She's a murderer!", referring to myself or the staff member. It was nearly impossible to speak to the patient over this screaming. During this time the protesters had the driveway blocked and filled with their bodies so that cars could not enter. They caused a severe dis-

ruption of passing traffic and there was one accident in the street in front of the driveway during the day. One woman followed me about for most of the day. Anytime I approached a patient she would scream loudly with her face two inches from mine, "Look at her, see how ugly she is! She has the face of the Devil. See Satan in her eyes. Look at her wickedness and see how evil she is." This, and minor variations of the same words were screamed at me over and over for several hours throughout the day.

8. Among other things, the anti-abortion people damaged the Center's front-door lock, requiring its replacement and broke the outside speaker which is still in the process of being repaired.

9. When our clinic is generally subject to anti-abortion picketing but not closed down as it was with Operation Rescue, the protesters make a great deal of noise in an effort to disrupt the medical and counseling services provided as reflected in the attached video tape. A Bullhorn was used at operation rescue and has been used to disrupt our services several times in the past. The second part of the video contains a demonstration at the Northwest Women's Center involving some of the same people as participated in the Nov. 28 Operation Rescue."

/s/ DIANE STRAUS, R.N., M.P.S.
Diane Straus, R.N., M.P.S.
Adminstrator

Sworn to before me this
— day of April, 1988

Notary Public

Petitioners' Affirmation—Bernard Nathanson, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN,
THE CITY OF NEW YORK, et al.

Plaintiffs,

—against—

RANDALL TERRY, OPERATION RESCUE, THOMAS HERLIHY,
JAMES LISANTE,

Defendants.

AFFIRMATION

BERNARD NATHANSON, M.D., under penalty of perjury,
hereby affirms:

1. I am a physician licensed to practice medicine in the State of New York. Although I am presently opposed to abortion, my medical experience includes wide experience in first and second trimester abortions.
2. I make this affirmation in opposition to plaintiffs application to enjoin Operation Rescue demonstrations in New York.
3. It is my medical opinion that the demonstrations of Operation Rescue, which have a history of being carefully structured, peaceful and of short duration, do not pose any health risk.
4. Operation Rescue demonstrations are planned with advance notice to police and take from two to three hours.

5. Such demonstrations take place in front of abortion clinics, as opposed to hospitals, and are announced more than a week in advance so that the clinics may plan accordingly.

6. In my medical opinion, to a reasonable degree of medical certainty, the following medical options are available to the abortion clinics in the area of the announce Operation Rescue demonstration:

(a) abortions to be performed in the 8th to 10th week of gestation may be deferred for one week without any significant medical risk;

(b) abortions to be performed in the 11th to 12th week may and should be referred to a hospital instead of being deferred because deferral will likely change the type of abortion procedure and increase medical risk;

(c) abortions to performed in the 13th to 15th week of gestation and in the 18th week and beyond may be deferred for a week without any significant medical risk.

7. Plaintiffs' papers seem to suggest that medical risk would arise from the introduction of laminaria to dilate the cervix, with the consequent medical necessity of removing the laminaria within 24 hours.

8. The medical use of laminaria in abortion is almost totally confined to second trimester abortion. It is the chief reason that abortions in the second trimester should be deferred for a week until the planned Operation Rescue demonstration is over.

9. The assumption that an abortion clinic would introduce laminaria during a week of planned and structured demonstrations is a false one because practical difficulties of this kind are routinely avoided by abortion clinics.

10. Even if an abortion clinic were unaware of the planned Operation Rescue demonstration (another false assumption), there would be ample time to manage or work around any demonstration which might occur at that particular clinic.

11. Laminaria introduced for abortions in the 13th to 15th week of gestation require only three hours and are early morning introductions, with the abortion scheduled in the afternoon. Since Operation Rescue demonstrations are planned only in the morning hours, this would mean that laminaria for these abortions would simply not be introduced at an abortion clinic where a demonstration occurred. This would mean inconvenience but would result in no medical risk.

12. Laminaria in the case of abortions in the 18th week of gestation and beyond are late afternoon introductions with the abortion scheduled for the following morning. If a demonstration occurred on the morning following a laminaria introduction, the patient could safely wait until the afternoon for an abortion at the same clinic. Again, there would be inconvenience but no medical risk.

Dated: New York, N.Y.

October 23, 1988

Bernard Nathanson, M.D.

**Preliminary Injunction Hearing
October 25, 1988**

DIRECT TESTIMONY OF BERNARD NATHANSON, M.D.

[83] MS. WETHERFIELD: Thank you.

Q. Dr. O'Callaghan, you have never counseled a woman in a health facility who has just entered that health facility having run a gauntlet of anti-abortion demonstrators, have you?

A. I have never been in a health facility counseling people in that health facility running through a gauntlet.

MS. WETHERFIELD: Thank you, I have no further questions.

THE COURT: Redirect.

MR. MERCER: We have no further questions, your Honor thank you.

THE COURT: Thank you, Dr. O'Callaghan.

You are excused. You are free to remain if you wish and to leave if that is your pleasure.

(Witness excused)

MR. SECOLA: The defendants would like to call Dr. Bernard Nathanson to the stand.

THE COURT: Dr. Nathanson.

THE WITNESS: Bernard Nathanson, M.D.

BERNARD NATHANSON called as a witness by the defendants, having been duly sworn, testified as follows:

THE COURT: I'd like, before you begin, doctor, to present to you this document marked Affirmation, courtesy [84] copy which has been given to me which has not yet been signed.

MR. SECOLA: I have a signed copy here.

THE COURT: Let's be sure it is signed.

MR. SECOLA: I have given you a signed copy and given counsel a signed copy.

THE COURT: Am I correct you signed the document yesterday, doctor?

THE WITNESS: That is correct.

THE COURT: Counsel, I am prepared to consider the statements contained in paragraphs 1 through 12 as constituting a portion of this witness's direct testimony and

would suggest that I'd be perfectly content if you built on that as to the balance of his examination.

MR. SECOLA: That's fine, your Honor. We can with that.

DIRECT EXAMINATION

BY MR. SECOLA:

Q. Dr. Nathanson—

THE COURT: Ms. Wetherfield, do you have any problem with that?

MS. WETHERFIELD: Not at all.

MR. SECOLA: I think it would serve the interest of time.

THE COURT: You'd indicated that the doctor had [85] some commitments and it seems to me you've achieved the advantage of placing his statements before the court and at the same time you can now move to enlarge upon them.

MR. SECOLA: Thank you, your Honor.

Q. Dr. Nathanson, I'd like you to tell the court a little bit about your education. Have you gone to college?

A. Yes, I've gone to college.

Q. Where did you go?

A. I went to Cornell University. Finished there in 1945, attended Magill University in Montreal, Canada, and graduated in 1949 with a M.D. degree. Spent a year as a rotating intern at the Michael Reiss Hospital in Chicago, a year as a surgical intern at the New York Hospital-Cornell Medical Center, a year as an assistant resident in urology at the New York Hospital-Cornell Medical Center, four years as a resident in obstetrics and gynecology at the Women's Hospital in New York City.

This seven-year period of postgraduate education was interrupted by two years of service in the U.S. Air Force as chief of obstetrics and gynecology in the Northeast Air Command.

Q. Have you had any academic appointment, Dr. Nathanson?

A. Yes.

Q. Please tell the court what that was?

[86] A. Well, I've been assistant clinical professor of obstetrics and gynecology at the Cornell University Medical College since 1963. That's the formal academic appointment. I've also actively taught at the St. Luke's-Roosevelt Hospital center which is part of Columbia since 1957. And from the year 1973 to the 1977 I was chief of the obstetrical service at that hospital and was responsible for student teaching of the students from Columbia in obstetrics and gynecology.

I am also presently on the staff St. Vincent's Hospital center which a part of the New York Medical College and in that capacity I also have teaching contacts with students from the New York Medical College as the St. Vincent's Hospital is the teaching affiliate for that university.

Q. Thank you, doctor. Could you tell the court if you are licensed and in what states?

A. Yes, I'm licensed in New York and Pennsylvania.

Q. When were you licensed in New York, doctor?

A. 1952.

Q. Are you a member of any societies, Dr. Nathanson?

A. Yes, I'm a member of the American Medical Association, the New York State and county medical societies, the American College of Obstetricians and Gynecologists, the American College of Surgeons and a host [87] of lesser organizations

MR. COLE: In the interests of saving time if Dr. Nathanson has his CV we will stipulate to whatever is in the CV and not have to go through this.

THE WITNESS: I have the CV.

THE COURT: That seems reasonable. I would suggest marking the curriculum vitae as Defendant's Exhibit A in connection with this hearing. Is that agreeable?

MR. SECOLA: Yes.

THE COURT: That is received and will be considered by the court concerning the background and qualifications of Dr. Nathanson.

(Defendant's Exhibit A was received in evidence.)

Q. Dr. Nathanson, what does your practice involvement?

A. Obstetrical and gynecology.

Q. In your experience have you had experience with abortion, doctor?

A. Yes, I've had a very extensive experience with abortion.

Q. Would you please elaborate to the court when that began?

A. Yes, in the late's 60's I, Betty Friedan, Lawrence Lader and Carol Greitzer and one or two others founded an organization known as the National Association [88] for Repeal of Abortion Laws, NARAL. The name has subsequently been changed to National Abortion Rights Action League, but the organization is essentially the same. It was an organization devoted to political activity in the field of abortions, more specifically to work to strike down all existing abortion laws throughout the United States. And indeed the world.

I was very active both in a medical capacity, I was chairman of the medical committee. I was also on the executive committee of that organization for many years.

We were successful beyond our wildest dreams. In two years we had succeeded or been instrumental in the striking down of the abortion law which had been on the books in New York State for 120 some years. And subsequently we participated in supplying data and information in the Roe v. Wade decision.

And as I say, I remained with that organization until 1975 when I resigned.

In January of 1971, concurrently with my work in NARAL I became director of the largest abortion clinic in the world. That was located at the time at 133 East 73rd Street. Subsequently moved to 424 East 62nd. I was the medical director. I had 35 doctors working for me, 85 nurses and counselors. We did 120 abortions a day seven days a week. And at the end of my tenure almost two [89] years later we had done 60,000 abortions.

I myself have done about 5000 with my own hands. I've supervised probably 10,000 more with residents in training. So I suppose I have about 75,000 abortions in my life. And I submit to you that that's a reasonable experience.

MR. SECOLA: Your Honor, I am handing you and the witness and opposing counsel an affidavit of William Rashbaum which has been submitted by plaintiffs back in their court papers in the Supreme Court of New York in April when their suit was originally filed in and which they rely upon in their present motion to receive another injunction. I don't believe we need to mark it since it is already in the file.

Q. Dr. Nathanson, could you please look at paragraph 3 and read that to yourself.

A. Yes.

Q. Have you formed an opinion, doctor on the statements made in paragraph 3 by doctor Rashbaum.

A. Yes.

Q. Could you please tell the court what that opinion is?

A. My opinion is that the paragraph really is simply not based on medical fact. It is in my opinion an exercise in pure fantasy. It has no grounding in medical data.

[90] THE COURT: You disagree?

THE WITNESS: In short.

Q. Doctor, if we could go to paragraph 4. Would you please read paragraph 4 to yourself, doctor.

(Pause)

A. Yes.

Q. If you could comment, if you've formed an opinion on the statements made in this paragraph?

A. The first half of the paragraph is factually correct and Dr. Rashbaum describes the medical data or the medical facts correctly. However, the second half the paragraph starting with the sentence "if there is a delay in finishing the procedure" is predicated on a premise which simply does not exist. Namely, that if in fact a second trimester abortion were begun and the laminaria were inserted with the patient having an appointment perhaps for several hours later or at the most 12 to 18 hours later, and for some reason the facility at which the procedure was done were closed temporarily, the

patient has a great number of alternatives which are not listed which are omitted here.

Some of them, for example, being either the laminarium can be removed and the procedure abandoned at this point, at some other facility, let us say in a hospital or some other doctor's office. Or if the patient is desirous of continuing with the abortion procedure, this can be [91] done in any number of hospitals and/or clinics operating within the confines of this city.

There are at least a dozen hospitals I know of that do this procedure and do it very well. And there are other clinics besides those in the immediate Manhattan vicinity which do this as well.

So the premise, the foundation for this statement is fragile and in fact is not supportable.

THE COURT: Is a patient who has had the procedure begun ambulatory?

THE WITNESS: Yes.

THE COURT: So the patient could walk, in your judgment, to another facility if that were necessary?

THE WITNESS: Absolutely. You are speaking now of just the initial step, the insertion of the laminaria. Yes.

Q. Why don't you explain to the court this procedure and how long it takes.

A. The laminarium is or was one or several pieces of sea weed, laminaria japonicum, it is called, which are inserted into the neck of the womb and then they would gradually take up moisture, swell and dilate the neck of the womb. These days more commonly a synthetic polymer is being used. But that's unimportant.

At any rate, once the laminaria are put in there [92] is no irrevocable commitment to abortion. The laminaria if the women changes her mind can be removed. As you point out she is ambulatory, she can go home, to a restaurant or she can do whatever she pleases. She can go to a restaurant if she is not having general anesthesia. But in general she is certainly ambulatory and can take herself where she wishes to go.

THE COURT: This paragraph discusses delay in finishing the procedure.

You said that the procedure could be continued at another facility. Would you tell me, in your opinion, what that time frame would be.

THE WITNESS: Yes. There is no recognized risk for a laminaria to remain in situ for up to 24 hours. After 24 hours it is conceded that there may be some additional risk in allowing it to remain longer than that time.

But up to 24 hours there is no risk incurred.

Q. Doctor, it states in the paragraph if I could read someone short sentence "this safe, legal-medical procedure is performed over the course of two or three days." Can you comment on that if that's a correct statement, and if it's not explain the procedure.

A. Well, I must say that's somewhat misleading, unintentionally I am sure. But in fact most of these procedures are done between let us say 13 and 17 or so [93] weeks. That's a procedure which is done within one day. The later procedures, and this is a very small minority of such procedures, from 18 to 24 weeks, are done over let us say two days. But we are talking now about fewer than 1 percent of all abortions.

THE COURT: You'll notice that the paragraph begins by indicating that about 10 percent of all abortions in New York State are performed in the second trimester. That is between the 13th and the 24th week.

THE WITNESS: Yes. But you can further break that down.

THE COURT: I was about to suggest that your comment is that perhaps 9 percent of the 10 percent or—90 percent, nine of the ten percent or 90 percent of these abortions are performed between the 13th and 17th—

THE WITNESS: 13th and 18th.

THE COURT: All right, I think you've made your point.

MR. SECOLA: Thank you, your Honor.

Q. On those 90 percent of these abortions, what is the time frame from the insertion to the abortion?

A. Again, if one is going to use a laminarium, and let me make it clear that not everyone doing this procedure agrees that laminaria should be used. There are some who will do this procedure without the use of laminaria. I [94] think on the whole, however, more people use them than do not use them.

In answer to your question, the time frame is something about 3, 4 or 6 hours after the laminaria is inserted. And we are talking now about the 13th and about the 17th to 18th week. The procedure is then terminated. That is to say the laminaria is removed, the abortion concluded and the patient is sent home.

Q. Is that an overnight procedure, doctor?

A. No, that's generally not an overnight procedure. Overnight procedures usually are after the 18th week.

Q. Thank you, doctor. Doctor, can you please read paragraph 5 of this affidavit to yourself.

(Pause)

A. Yes.

Q. Dr. Nathanson, if you could comment, have you formed an opinion, first of all about paragraph 5?

A. Yes.

Q. If you can comment, doctor, if it would be easier sentence by sentence or subject by subject matter on what your opinion is of these statements in paragraph 5.

A. Well, generally, I think that if a woman is determined to have an abortion, and the place in which she has made her appointment for some reason cannot carry out the abortion at the appointed time, certainly she will be [95] discommoded and to some extent frustrated, perhaps. But let me again assure the court that there are a great many places and facilities in this city which will do the procedure for her.

And I now refer to a number of hospitals which will do the procedure at least as well as any abortion clinic. And in fact, Dr. Rashbaum, who made these statements, I believe to the best of my knowledge does these procedures at the Beth

Israel hospital, not in a clinic. That is to say a free-standing clinic.

So if the woman were absolutely determined to go ahead and have the abortion and for some reason if that facility were incapacitated or inactivated she could certainly turn to one of the dozen or so hospitals that do this procedure.

THE COURT: Suppose she had attempted to enter the Women's Choice Clinic at 17 West John Street in Hicksville and found that demonstrators had blocked ingress to and egress from the clinic. Where could she go, assuming she could not enter those premises?

THE WITNESS: Probably to the Nassau County Medical Center, where they do on—

THE COURT: Where is that located?

THE WITNESS: Very close to Hicksville. I don't know the exact address, but it is within 15 minutes or so by [96] car. And they do these procedures there.

THE COURT: On a non-scheduled basis?

THE WITNESS: Yes.

THE COURT: In other words, you just walk in and they will take you?

THE WITNESS: If you say "I have had a laminarium inserted and the procedure has been begun and the place at which I was supposed to have this procedure has been inactivated," yes, they will go ahead and do it.

MR. SECOLA: Thank you, your Honor.

Q. Doctor, could you please read paragraph 6 of Dr. Rashbaum's affidavit.

(Pause)

A. Yes.

Q. Have you done that, doctor?

A. Yes.

Q. Have you formed an opinion as to the statements in paragraph 6?

A. Yes, I have.

Q. Could you please tell them to the judge.

A. Well I think the first part of the statement is, I suppose, in a penumbral way reasonably correct. No one wishes

to carry out surgical procedures in a maelstrom or in the middle of Times Square. On the other hand, when I was running my clinic we frequently had demonstrators outside [97] of our clinic yelling and shouting, harassing the patients as they came in, and yet we carried on perfectly well.

I think the second part or the last two—

THE COURT: Yelling and shouting. What about blocking ingress and egress in such a fashion that the patients could not enter or leave the premises? Did you have that experience?

THE WITNESS: Yes, we did and we had to call the police on several occasions to have the people removed. The second part—

THE COURT: Where was the facility located?

THE WITNESS: 424 East 62nd Street.

THE COURT: And you say there were demonstrations.

THE WITNESS: Yes.

THE COURT: Do you remember, were there 400, 500 people? How many people showed up at those demonstration where you called the police?

THE WITNESS: There were dozens, to my recollection. I have a book which I wrote and on page 142 as a matter of fact I did refer to it in the book as a series of demonstrations by shrill right to life groups outside the building intimidating and screaming insults at patients, counselors and physicians alike as they entered.

THE COURT: Exercising, of course, their right to [98] free speech, is that correct?

THE WITNESS: Yes, their First Amendment rights.

THE COURT: Were the demonstrators formed like perhaps a wall numbering in the hundreds, or did they march up and down as picketers usually do and carry signs and placards and shout their various slogans?

THE WITNESS: To the best of my recollection there were not hundreds. There were dozens of picketers at times. They would walk up and down with their placards shouting, banging on the windows, hurling insults at the patients, the doctors, the counselors. It was with-

out question disruptive. But the clinic continued to function and to my knowledge as the director there were no untoward incidents or medical risks incurred from that procedure.

THE COURT: Your patients were able, as I understand it, despite the harassment, to walk in?

THE WITNESS: Yes.

THE COURT: And to walk out?

THE WITNESS: Correct.

THE COURT: Very well.

THE WITNESS: The latter part of this statement I find, by the way, charitably hyperbolic.

Q. Which statement?

A. "Women clients who are harassed by crowds upon entry to the facility might hyperventilate because of [99] tension which could cause severe imbalance in blood gases which could have serious or catastrophic results." As I say, I would characterize that charitably as hyperbolic.

THE COURT: You would never say anything like that, is that correct?

THE WITNESS: "Never" is a very tough word, your Honor.

THE COURT: Not today anyway.

THE WITNESS: Not today, no.

THE COURT: Very well.

Q. Before we get into the affidavit of Dr. Mullin, which we will do next, doctor, in your experience you've stated that there were demonstrations in front of your clinics and what-not and you've described to the court the kind of activities that went on. Were you aware of any women, any patients that were psychologically or emotionally damaged which harmed them from these demonstrations that you personally saw?

A. No. We had no evidence to that effect whatever. Patients who came in were counseled, were calmed and soothed by the counseling if in fact they had been ruffled in

the first place, and the procedures went on without any untoward events.

I was not aware, in short, of any adverse consequences of these demonstrations upon our patients

[100] MR. SECOLA: My brother counsel Mercer has already dealt with the affidavit of Jeanine Michael and I just want to deal with one statement in it.

Q. Doctor, if you could read in paragraph 3 the sentence is "the only clinic in New York City that will provide abortions as late as 24 weeks after the last menstrual period." To your knowledge, is that a correct statement?

A. That's egregiously incorrect. There are hospitals which do this, there are other clinics in the city which do this. One need only consult one's mail as a practicing gynecologist, I am speaking of M A I L, not M A L E, and one can find innumerable advertisements and solicitations from various clinics which do this kind of work.

THE COURT: Provide abortions as late as 24 weeks after the last menstrual period?

THE WITNESS: Correct.

THE COURT: Can you name one?

THE WITNESS: The Kingsbrook Hospital out in Brooklyn does it. That's not a hospital, it's an abortion clinic. It calls itself a clinic.

THE COURT: The word is clinic and that's the word used by the affiant. Could you identify any other facility which doesn't carry the name "hospital"?

[101] THE WITNESS: Yes, there is a Lincoln Plaza Clinic which does them. There is one that escapes me at the moment. There are at least one or two other clinics besides at least a dozen hospitals.

Q. If we could go to the affidavit of Dr. Mullin which again has been put in evidence by the plaintiffs in their moving papers in April of 1988.

THE COURT: We will take a brief recess.

(Recess)

BERNARD NATHANSON, resumed)

THE COURT: I May proceed, Mr. Secola.

MR. SECOLA: Your Honor, if I could just do something as part of the oral argument this morning I would like to identify the opinion that I hand you from the First Circuit. The case is entitled Planned Parenthood v. Operation Rescue. I have another copy for the court. Before Campbell, Chief Judge; Breyer and Torruella, circuit judges. The appeals number in the First Circuit is 88-2047 and it was an appeal from a district action of the same title, the docket number in the U.S. district court in Boston being 88-2329-MA before Tauro, District Judge.

BY MR. SECOLA:

Q. Dr. Nathanson, if I could just refer back quickly to the affidavit of Dr. Rashbaum before we leave it. Regarding paragraph 3, which you've commented on earlier [102] essential this states that "the hostile closure of a facility without notice, even for a day, can have very serious implications for the physical and psychological health of the women with appointments that day."

You stated you disagreed with that. Could you tell the court why that's so?

A. Well, certainly I find no basis in fact for the claim here that it could have physical adverse consequences if it were closed for one day. As I say, there is no evidence that postponing an abortion procedure for one day has any adverse ramifications.

THE COURT: Physical?

THE WITNESS: Physical.

A. As I said, in addition to which there are other facilities to which such patients can be referred. As far as psychological health, I think I would have to defer to the opinion of someone like Dr. O'Callaghan, who is after all a professional psychologist.

THE COURT: You are not expressing any opinion concerning the mental effects of the delay, is that right?

THE WITNESS: All I said, think earlier was that this would certainly constitute some source of frustration for women who are determined to have the abortion procedure on that day. But with respect to any lasting psychological damage, I am really not equipped to testify to that on that [103] point.

Q. The affidavits that have been submitted by the plaintiffs, Dr. William Rashbaum and Thomas Mullin, do you have any knowledge of those doctors?

A. I do know Dr. Rashbaum, yes.

Q. How do you know him, sir?

A. Well, he worked for me briefly at the abortion clinic which I ran in the 1970's.

Q. Doctor, if I could next turn to the affidavit of Dr. Thomas J. Mullin. Could you please read paragraph 5, doctor, on the bottom of page 2 and it goes on to page 3.

A. Yes.

Q. Have you formed an opinion, doctor, about the statements in this paragraph?

A. Yes, I have.

Q. Could you please go subby subject that he states here.

A. Yes, I'm not prepared really to comment at any length on the patient's abilities to exercise their constitutional rights. I think that's a real legal question which I would defer to attorneys on.

With respect to delay of even a few days causing significant additional health and safety risks to the patients, I think that that's well, something less perhaps than a medical or pedagogical sunburst. When we calculate [104] morbidity rates, that is, of adverse consequences we are talking in increments of weeks. We do not speak in terms of days. Days are really of no significance. When we talk about increases in morbidity, injury, infection and so on we are talking in increments in weeks. I think to discuss this subject in increments or in units of less than a week is simply meaningless.

Q. Thank you, doctor. Could you please look on page 3 to paragraph 6 and read that of doctor mull's affidavit.

(Pause)

A. Yes, I've read it.

Q. Doctor, have you formed an opinion about the comments in paragraph 6?

A. Yes.

Q. Can you please tell the judge what they are.

A. Well, again, the foundation of this entire paragraph is egregiously fragile and predicated on the premise that, first of all, most second trimester abortions are done very late in the second trimester which is not the case. And I think the judge and I have had a colloquy on that earlier. Most of them are done we know the 13th and, say, the 16th or 17th week, which is an one-day procedure. The laminarium is placed and hours later it is removed and the patient is then terminated.

So for the very small number of abortions which [105] are done over the two day period and these would be in the range of 18 to 24 weeks, it may very well be true that the laminarium have been inserted, 12 or 24 hours later should be removed and either the procedure terminated or the procedure abandoned.

But if the patient were unable, again, to gain access to that particular clinic at which the procedure was initiated, she has an entire spectrum of viable and reasonable alternatives, including terminating the procedure or at least abandoning the procedure, going to a hospital, going to another clinic and so on.

I just think that this is, as I say, somewhat overheated in its contentions.

Q. Doctor, can you look at paragraph 7.

A. Yes.

Q. Have you formed an opinion on the statements in paragraph 7 of Dr. Mullin's affidavit?

A. Yes.

Q. Please tell the judge what they are.

A. Paragraph 7 rests on the foundation proposed in paragraph 6, namely, that once and I am quoting now from the

middle of paragraph 6 "once fully dilated" now the term "fully dilated," by the way is term which is customarily reserved for obstetrical goings on. It means the cervix is fully dilated to accommodate the fetal head. We don't—no [106] one fully dilates the cervix in these procedures.

It may very well be that if the patient does not—if the patient has the laminaria removed, does not appear for the termination of the pregnancy, then, yes, she may be in fact break her water and undergo a spontaneous miscarriage, an abortion. This, by the way, is not fraught with hazard. In fact, it is probably safer than having somebody actually artificially terminate the pregnancy, if the woman spontaneously is passing the pregnancy herself.

So I do know the understand the entire development or evolution of this argument in paragraph 7 and would characterize it as some sort of fiction, some sort of an elaborate fiction here.

Q. Doctor, I'd like to put you again to paragraph 6 and let me read a short statement a focus your attention on it. The latter paragraphs of paragraph 6 states "there are few if any doctors in New York who are fully familiar with and capable of performing this surgery." Obviously referring to the laminaria surgery. In your opinion is that a correct statement?

A. Well, if one takes all the doctors in New York City, that's probably true, comparatively few. If one takes all the practicing gynecologists that's probably not correct.

I can't give you or quantify for you with any [107] kind of Euclidian certitude the number of doctors who can do it, but there are certainly adequate numbers in this city of 10 million people and 20,000 doctors, including probably 5,000 gynecologists who can do this.

I myself know a number. So that I just think, again, that this is hyperbole.

Q. In some of the papers that have been filed with the court and some of the arguments made by the plaintiffs there is reference, I need to elaborate a little bit and then ask a question.

There is a reference to essentially a physician-patient relationship having gone on between the woman and the abortionist doctor, therefore if she is forced to go somewhere else that's very bad and medically harmful because he won't have her records, et cetera. Could you please comment upon that argument in your view?

A. I really think that's institutionalized nonsense.

THE COURT: Then a relationship between a woman and a gynecologist-obstetrician is insignificant in your book here?

THE WITNESS: No, I did not say that.

THE COURT: What did you say?

THE WITNESS: The relationship between the woman who goes for an abortion and the doctor who does the abortion in the clinic is insignificant; it probably exists [108] for not more than 30 seconds or a minute during which time, after the patient has been counseled, her history has been taken, her laboratory work has been done, she is brought to the operating room and the doctor then for the first time makes his appearance while the patient is lying on the table ready for her anesthesia.

And he generally will come over to her and say "I am doctor so and so, I'm going to do the abortion." And then he points to the anesthesiologist and says "go ahead, put her to sleep." That's generally the extent of the doctor-patient relationship in an abortion clinic. I am not speaking of the private patient who goes to her doctor, wants a abortion and is taken into his hospital to do it.

Q. Thank you. Doctor, I'd like to set up I guess it would be normally called a hypothetical question, but give you some of the facts that are involved that we've spoke of earlier regarding the activities of Operation Rescue.

You have a abortion clinic or a doctor's office that performs substantially only abortions and it would be blockaded, there would be a human barrier so to speak as your Honor has used the term, of people, from my knowledge sitting down and blocking ingress and egress, sitting on the sidewalk.

THE COURT: Several hundred perhaps.

Q. Anywhere from 50 to several hundred. And in that [109] situation a woman would come and because of that be turned away, she would not be able to get her procedure, at least during the time of the demonstration.

Do you believe that the inability of that woman to get her abortion at that time would cause a serious and significant medical and physical risk to her?

A. Emphatically I do not.

Q. Please explain to the judge why you have that opinion?

A. Again we return to the fact that this is not Baffin Bay or St. John's New Foundland. This is New York City. Women have a great spectrum of alternatives here. They can go to another hospital, another clinic or they can use profitably the time, the 24 hours or so, as a period of cooling off, of reflection, of reviewing the abortion decision.

Frequently when women actually enter into the gestalt, the reality of the abortion clinic itself or into the vicinity of it they may have second thoughts, and it may be profitable in many instances to use that time, perhaps 24-hour time to reflect again on the decision. A decision is, after all, a momentous one in anyone's lexicon and I think in that instance the alternative of reflecting or going to a hospital or going to another clinic this is a range of alternatives which is absolutely acceptable.

[110] Q. Doctor, is that your answer to a reasonable medical certainty?

A. That is my answer it a reasonable medical certainty.

Q. Doctor, we state in your affirmation that you no longer perform abortions, that you are now opposed to abortion. When did that occur, your opposition to abortion?

A. Well, it was not an incident on the road to Damascus. It was a period of over three or four years, I suppose, during which time I was involved in setting up the obstetrical unit at the St. Luke's Hospital using new equipment and new apparatus which we had just brought in, ultra sound machinery and fetal heart monitoring equipment and so on.

I think in the succeeding three or four years I began to realize that this person, this occupant of the uterus was my patient. And I think in fact all obstetricians now are of that mind. If one refers to any standard textbook in obstetrics one will see this contention. The intrauterine occupant is my patient. Now it seems to me that I should then not be in the business of decimating my patient population, unless there are compelling medical reasons to do so.

And by the way, in those circumstances I would not be opposed to abortion, were there are compelling [111] medical circumstances.

Q. Thank you, doctor. One last thing. When you ran this you stated it to be a very large abortion clinics in New York, the largest that you knew of at that time in the world. Did you ever experience delays in the procedure of a second trimester abortion?

A. We did not do second trimester abortions in that clinic. Only first trimester.

MR. SECOLA: Your Honor, I have no further questions and I would ask that the doctor's request he had an important phone call that he received before testimony. If we could have a two minute break for him to return that.

THE COURT: We will take a brief recess, five minutes, and then proceed.

MS. WASHBURN: I have a witness that will take no more than that five minute break. Could I get him on and get him off?

THE COURT: No.

(Recess)

THE COURT: You may cross-examine, counsel.

MR. COLE: Thank you, your Honor.

CROSS-EXAMINATION

By MR. COLE:

Q. Dr. Nathanson, have you previously testified in court?

Preliminary Injunction Hearing
October 25, 1988

DIRECT TESTIMONY OF STEPHANIE O'CALAGHAN, Ph.D

[31] MR. MERCER: Thank you, judge.

THE COURT: We will take a brief recess. I'd appreciate if counsel let me know and I should like to get started within the next 15 minutes if possible.

(Recess)

THE COURT: We will resume at this time. I will hear the first witness.

MR. MERCER: If it pleases the court. Is it permissible to use the lectern? How do you prefer that?

THE COURT: I prefer counsel to work from where the lectern is so that it is clear that the attorneys who are involved will hear the testimony. If you get up too close sometimes the witness is not audible.

MR. MERCER: Yes, your Honor. The defendants would call Dr. Stephanie O'Callaghan.

THE COURT: Dr. Stephanie O'Callaghan.

STEPHANIE O'CALAGHAN

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MERCER:

Q. Doctor, what's your professional occupation?

A. I'm a licensed psychologist in New York State.

Q. How long have you been a licensed psychologist in New York State?

[32] A. For ten years.

Q. Where do you presently conduct practice, if you do so?

A. I practice primarily out of my office in Croton-on-Hudson, New York, and in Mahopac, New York.

Q. Doctor, tell the court a little bit about your educational background, where you've been to school, what kind of studies you've been involved in.

A. I went to Cornell University and then transferred to Brandeis University and received a bachelor of arts degree from Brandeis University.

THE COURT: When?

THE WITNESS: In 1964.

A. I then went to Columbia University Teachers College where I received a master of arts and a professional diploma in counselling psychology.

THE COURT: When?

THE WITNESS: I received my master'ss in 1965 and I received my professional diploma in 1967.

A. I then went to—well, while putting my husband through school and having children I then went to the University of Pennsylvania following my advisor and I received a PhD from the University of Pennsylvania in school and counselling psychology in 1977.

Q. Did you do any following work after that with [33] internships or residencies?

A. I had one year internship and two years of residency at the universities of Drew University; Brooklyn Polytechnic Institute and Fordham University in counseling and school psychology. I had one other internship at the Newton public school system outside of Boston, Massachusetts.

Q. What did that practice constitute?

A. That was a school psychology internship.

Q. What age groups did you deal with as a school psychology intership?

A. In the internship I dealt with elementary school children.

Q. Doctor, have you published any papers in the educational community?

A. Well, my dissertation was published in Dissertation Abstracts and then I published an article in the Journal of School Psychology.

Q. What did your dissertation deal with?

A. It was on cross-modal transfer of directional information. It was called "The Influence of Laterality Training on Visual Discrimination of Direction in Children".

Q. You are presently conducting practice. Could you describe the type of practice you conduct in any areas of specialty you deal with?

[34] A. I have a general practice where I see children from the youngest of ages, pre-birth, in fact to all the way through old people in their 80's. I still have, I retain the specialty in learning disabilities. And I work with poor people, particularly homeless people. I do marriage and family counseling rather extensively. And since I had an essential recovery from my abortion I have been specializing in pre-abortion counseling and post-abortion trauma counseling.

Q. Are you presently a member of any professional societies or organizations?

A. I'm a member of the American Psychological Association and the local organizations in psychology and I am the area representative for American Victims of Abortion, the metropolitan area representative for American victims.

Q. Have you held any academic positions, doctor?

A. I was a professor at Westchester Community College, adjunct professor in the '70s and I also taught courses at Fordham University, an Drew University.

Q. Generally what courses were you dealing with?

A. Personality and motivation and general psychology.

Q. You mentioned being involved in I believe it's the American Victims of Abortion. What kind of organization is that and how did it come about and what are its purposes?

[35] A. It's an organization of women who have had abortions and have suffered greatly from the abortions and who are devoted to trying to explain to people what the consequences of abortion can be for women and to try to reach out and help as many people as possible from the suffering that they may endure.

Q. How did you personally come to be a member of AVA?

A. In January of 1984 I was pressured to have an abortion and after the abortion I had a very severe psychological and physical reaction. And I wanted to commit suicide and I called up a woman who I knew who got in touch with Olivia Gans and another area woman who was in what was then

WEBA, which is Women Exploited By Abortion, which was also a group of aborted women who had suffered from the abortion and who were reaching out to help other people.

And they called me and saw me and comforted me and helped me through the worse initial stages of my trauma. And over a period of time they urged me to try to become active in helping other people as a means of continuing to help myself.

Q. Go ahead and describe how the abortion came about. You mentioned you were coerced. Explain to the court what you meant by that.

A. I have four children and I've had several [36] miscarriages, and my last two children—

THE COURT: How old are you?

THE WITNESS: My oldest is—

THE COURT: How old are you?

THE WITNESS: I'm 46 years old.

THE COURT: So in 1984 you were over age 40?

THE WITNESS: Yes.

THE COURT: You were about 42?

THE WITNESS: I was 41 at the time.

THE COURT: At that point you'd had four children?

THE WITNESS: I'd had four children and five miscarriages.

THE COURT: And you were pregnant?

THE WITNESS: I was pregnant. I did not plan on the pregnancy. I hadn't planned on the last two pregnancies before that. And in each of the cases of my third and fourth children my husband strongly urged me to abort those children. And in the first instance I felt strong enough to resist the pressure.

In the fourth child that I have I got to the point where I even made an appointment with the Ob/Gyn but I then was able to recognize how bad it would be for me and so I cancelled that appointment.

But then, when I was pregnant with this last [37] baby, my Ob/Gyn had recently died and he knew me very well and he knew that it would not be right, an abortion, for me, so I—

my cousin referred me to a friend of hers. And when I called him up I told him I didn't feel that I could have a abortion but I was pregnant and I wanted to explore it because my husband was urging me to.

THE COURT: When was this?

THE WITNESS: This was in early January of 1984.

THE COURT: At that time do you know how long you had been pregnant?

THE WITNESS: Well, I thought I was nine weeks pregnant, but I was at that time almost 15 weeks pregnant.

Q. That would be the second trimester, correct?

A. I was in the beginning of the second trimester.

Q. Let's go on and we will come back to that as it is appropriate. Are you a member or have you been a member of any boards as part of your activities?

A. Well, I was a member of the board of education in Croton-on-Hudson in 1975 to 1978. I was a member of the board of the Birth Education Program for Westchester and Putnam County in the late 1970's. I am currently a member of the Northern Westchester Coalition for Housing and the Homeless, a board member, and I was co-founder and co-coordinator of the Croton-Cortland Womens Center, Croton-on-Hudson area, New York.

[38] Q. As part of your counseling activities and activities in psychological practice, have you recently had occasion to be involved with the surgeon general of the United States' office and if so explain to the court how?

A. In the spring of this year I was asked to meet with the surgeon general, Surgeon General Koop, along with other professional counselors who had experienced abortion and who had suffered from the abortion incident. And we were there to speak with him to testify to him about our personal experiences as well as the experiences that we were not familiar with with the people we were dealing with.

Q. Have you had any occasion to be involved with the media such as newspapers, television, radio?

A. I was on People are Talking, along with male victims of abortion, several months ago on WWOR-TV. I have been

on CBS radio with a group of doctors who were countering the position by Carl Sagan and other scientists in terms of the human—of when a child is human during the period of pregnancy.

And I have had my own psychology call-in show on WPUT recently, and it has just ended this past month or a few months ago.

Q. Have you previously testified in court, doctor, and if so please describe what types of cases you've given testimony in? Did you hear my question?

[39] THE COURT: Have you previously testified in court?

A. Yes, I have previously testified in court and in court papers—

THE COURT: No, that was his question. How many times have you actually been in court, as you are today, and testified?

THE WITNESS: I have been in a court testifying in about ten cases.

Q. What types of cases? Briefly describe them for the judge.

A. The cases in court, in actual courtrooms that I've testified at have been primarily child custody cases, divorce cases and and cases of children with learning disabilities.

THE COURT: Have you testified previously with regard to abortions?

THE WITNESS: I have provided court papers for that but not—

THE COURT: We may get to that but right now your testimony is that you have not testified in court on that subject?

THE WITNESS: Correct, your Honor.

Q. Have you previously provided any testimony by affidavit or any other documents in cases before courts in [40] the jurisdiction of the Federal government or in the State of New York?

A. I have testified in the jurisdiction of the State of New York in terms of—by affidavit in terms of assisting the case of helping woman to avoid abortion that an institution was attempting to prevail upon her.

THE COURT: You furnished, as I understand it, an affidavit in that matter?

THE WITNESS: Yes.

THE COURT: on how many occasions have you furnished affidavits on the subject of abortion counting that as one?

THE WITNESS: In a courtroom situation, I recall furnishing the one. In other situations of testimony that are not courtrooms, I have furnished testimony about five other times.

Q. Are you being paid or remunerated in any way for your testimony today or for your appearance today?

A. No, I am not being paid.

Q. In the course of your practice, doctor, have you had occasion to render or provide psychological treatment for women who have experienced abortions, and is so, please outline or explain that experience?

A. Yes, this is now a normal course of the treatment that I provide with women who have experienced abortions. [41] And I have found that when women have been referred to me, either because of abortion trauma or because of other reasons where abortion trauma has existed, I have found that the treatment was really important to be done by a licensed professional in the field rather than peer counseling because the women were very psychologically disrupted by the occurrence of the abortion.

THE COURT: You are speaking of post-abortion counseling?

THE WITNESS: I am speaking to the question of post-abortion counseling. I have also counseled women before contemplation of abortion.

THE COURT: You indicated earlier that your practice included both pre-abortion and post-abortion counseling?

THE WITNESS: That's right, your Honor. Would you like me to address the pre-abortion?

THE COURT: I would like you to listen to the next question.

Q. Go ahead and expand.

MR. MERCER: My original question also asked her to outline or explain briefly for the court's benefit the bases of her experience.

Q. If you could go ahead and explain the type of cases and the extent of your practice in that regard. And [42] how many years. That's a big menu.

THE COURT: Break it down. It is much better to break it into parts.

Q. Go ahead and outline for the judge the types of cases you have been dealing with.

A. Before my abortion I was not sensitive to the issue of abortion, and in fact I had at one time taken a friend, before abortion was legal, to meet somebody in a parking lot who picked her up and took her for an abortion. And I had no idea the trauma that she had suffered afterwards.

But after my own abortion, I realized that my suffering was so extreme and I got in touch with so many other people who had had similar suffering that I realized that it was a part of women's development that has not been addressed by my profession adequately and certainly not by myself. So through the course of my own personal recovery and counseling I learned specifically about what abortion—post-abortion counseling is, and I was able to then apply it to my knowledge as a psychologist of clinical work in general.

So I then had occasion to work with many women who were post-abortion victims and the course of that therapy involves grief therapy. The basic thing about abortion victims is that they are suffering the grief of the [43] loss of their baby.

Q. We will get into that more deeply. Perhaps if you could detail some of your experience if any with pre-abortion cases.

A. With pre-abortion cases primarily I've dealt with people would were referred to me or who came to me indicating that they were being—that they were pregnant and that they were either considering the abortion or being pressured to have an abortion.

And in those cases I had to be very careful not to impose my own personal concerns upon them but to try to be aware of what these people could live with as well as my knowledge of what post-abortion syndrome entails.

In one case I was not—in one case the women did go ahead and abort and she continued—she became continued in her alcoholic depressive way that she had been before the abortion, and she left treatment.

In all other cases the women have made the decision to keep the child, and they have all been extremely grateful to me from the point that they made that decision. And once the baby was born, there was no way to describe how they felt grateful to me. But I did not make that decision for them. These women all were inclined to make that decision if allowed to explore the whole situation for themselves, except for the one.

[44] THE COURT: Am I correct that you counseled them prior to their making the decision?

THE WITNESS: Yes.

THE COURT: Would you say that during that period of counseling these women showed emotional concern for what was occurring?

THE WITNESS: Yes, your Honor, they were all emotionally concerned about what was going on with themselves and in their lives in general.

THE COURT: And you counseled them to assist them in this period, as I understand it?

THE WITNESS: Yes.

THE COURT: But left the ultimate decision in each case to the patient?

THE WITNESS: Yes.

Q. Perhaps if you tell the judge a little bit about your background in terms of political approach than your other activities so he understand the position you are coming from in terms of your counseling.

A. My political approach?

Q. Yes.

A. Well, I'm a registered Democrat and I was a liberal activist—

MS. WETHERFIELD: Your Honor, I would object to the relevance of this testimony. Ms. O'Callaghan is [45] testifying if at all—

THE COURT: Yes, it is really not a political matter. If she wants to testify about her—I've been under the impression, despite what certain public figures are saying and doing, that this matter cuts across political labels and people who may be labeled liberal in certain areas take a strong view, as does this witness, and others, who may be labeled conservative, do likewise.

I would suggest that it would appear to me to cross the political spectrum.

MR. MERCER: We will withdraw the question.

THE COURT: Has that been your impression, doctor, speaking as a liberal Democrat?

THE WITNESS: Speaking as a liberal Democrat it is my impression that women who experience post-abortion trauma can be anything. The trauma goes beyond that.

MR. MERCER: Thank you, judge.

Q. Doctor, are you familiar with a movement or organization as you may describe it called Operation Rescue and the type of sit-in demonstrations that have been conducted at abortion clinics such as here in New York, April 30 through May 7 of this year, and in Atlanta during the period of the Democratic National Convention I believe it was in August?

MS. WETHERFIELD: Objection, you Honor. I don't [46] believe that as yet Mr. Mercer has actually qualified this witness to speak about emotional harm caused to people whose abortions are delayed.

THE COURT: Let him do it his way.

A. Yes, I'm familiar—

MR. MERCER: Excuse me, if I understand counsel correctly she may be raising an objection to the qualification of the witness.

THE COURT: I don't think that. To the extent that she has objected, her objection is overruled. So far you have asked a number of questions concerning the wit-

ness's background. You have not yet proffered the witness as an expert in the particular area, nor have you asked her any opinion questions.

MR. MERCER: I would like to offer her testimony in regard to the issues of abortion and the danger therefrom and the emotional harm that a woman might suffer by being refused an abortion or by being forced to run a gauntlet running into an abortion clinic and the question overall of the emotional damage that she could suffer from a abortion if that took place.

MS. WETHERFIELD: I will object at this point. I don't believe that the doctor has given any indication that she has any expertise whatsoever in counseling women or indeed in talking to women at all who have had to run the [47] gauntlet of anti-abortion protestors shouting such things as murderer.

THE COURT: He just started to touch on Operation Rescue and her familiarity with the events. That's why I suggested to you let him do it his way. He may be developing more slowly than you would or from a different perspective, but I want to give him the opportunity to present his position and then give you the opportunity to cross-examine.

MS. WETHERFIELD: I will reserve my recollection.

MR. MERCER: If it please the court, psychological stress is psychological stress.

Q. Are you familiar, doctor, with Operation Rescue as I asked earlier and the sit-in demonstrations they have conducted and the type of sit-in demonstrations?

A. Yes, I am.

Q. Is there such a thing as a typical prospective abortion patient, a typical woman seeking an abortion in terms of anxieties, questions, or fears that she might have?

A. I see people, women who are anticipating abortion, in two basic categories. One is the woman who is feeling rather convinced that she wants an abortion and who is not thinking about the baby in terms of human form at all, who is in my professional opinion in a state of denial that there is a human

developing in her body but is more [48] likely to be thinking of it in terms of her own difficulties and inconveniences. And a that is a person who really believes that this is the right thing for her, consciously believes that.

And then the vast majority of women who are headed for abortions are more likely to be in conflict about the abortion and to be more in touch with the idea that there is a developing child within them that they are nurturing and yet, for reasons usually sensing pressure from either society or her boyfriend or husband or parents, feels that she is supposed to do what is right, meaning abort the child, despite her lack of conviction that this is the right thing for her.

THE COURT: In other words, that woman, in your opinion, is reacting to either social or peer pressure?

THE WITNESS: I believe so. And I believe that social and peer pressure is enormous in America today as I personally felt it. My mother had two abortions, my aunt is very active in Planned Parenthood, my mother gives money to Planned Parenthood. So that I personally, and from the woman I see, know that women assume that it is their obligation in many cases to abort a child that they are carrying despite a very normal maternal sense if she can't at that point feel the baby moving inside of her.

Q. Doctor, what evidence or evidence of stress [49] might you expect to see in a woman who has been turned away from a abortion because of a demonstration or because of a sit-in demonstration? Let me give you a little factual background. There might be perhaps 2, 3, 400 demonstrators around the clinic, there will be police, there will be people blocking the door, probably some shouting, perhaps some chanting—

MS. WETHERFIELD: Objection. Is this a hypothetical question or in her experience?

THE COURT: She doesn't claim to have been actually present. He is, in my judgment, fairly accurately picturing what I understand occurred at a number of Opera-

tion Rescue demonstrations. But I'd like you to assume all of those things: A number of people, in the hundreds, gathered in very close proximity to the premises where abortions are being carried out, who are speaking in loud voices, carrying signs and placards and actively attempting to keep people from either entering or exiting the premises. All right, do you have the picture?

THE WITNESS: Yes.

MR. MERCER: When you say actively, you mean actively in terms of sitting in front of the door and blockading rather than pushing people away?

THE COURT: Let's say that they are in such close proximity to each other that they form a human barrier. We [50] are not talking about pushing, we are talking about forming a barrier to the entrance.

MR. MERCER: Thank you.

THE COURT: Just as if you would build a wall of some kind. This happens to be people, all right?

THE WITNESS: Yes.

THE COURT: Now counsel is going to ask you a question.

Q. To restate the question: what are the evidences of stress you might expect to see, as a professional, in a woman who is faced with the kind of situation the judge has just explained to you?

A. Well, for the woman who is determined to have the abortion and is not consciously feeling concerns about negative aspects of it, I think that she would probably be annoyed and possibly angry. And most of those women would find another way—probably most of those women would find another way of having the abortion, either at another place or at another time.

But I doubt that it would cause a great trauma, any great degree of trauma to that women. I think it would be more of a level of anger and annoyance and maybe increase her determination.

For the larger group of women who are in conflict, I think that that would probably cause some [51] concern—greater

reflection to those women about what they are doing or planning to do. And I think it would cause the woman to reevaluate the situation and probably many of them would not abort eventually after that.

THE COURT: In your opinion, could you state with a reasonable degree of medical certainty if these women in conflict would suffer additional emotional stress as a result of arriving at a premises with the intention of entering and finding the people forming a human wall and calling out, carrying placards and the like?

MR. MERCER: If it please the court, could you define additional emotional distress for us?

THE COURT: She has already testified I thought that these women who were in considerable conflict as a result of peer and social pressure were in conflict and under emotional stress. Is that correct?

THE WITNESS: I would say that most women are in some level of conflict and it will range from mild to considerable.

THE COURT: And you could characterize that, could you not, as emotional stress?

You used the word "conflict." It is an emotional conflict?

THE WITNESS: It is an emotional component. I wouldn't at that point qualify it as a serious level of [52] stress except for a cohort of women, who might be about 20 percent of women who would be in a serious state of stress at that point.

THE COURT: Whatever the level of stress is, confronted with the situation which has been described to you, in jury judgment would that increase the level of stress, in your opinion?

THE WITNESS: In my opinion. I think that there would be a large number of women who would be relieved of stress because they would then have a reason to not abort, which they really wished to do. They wish to withdraw from the abortion situation.

THE COURT: Some would be relieved of stress.

THE WITNESS: I would say a large group would be relieved. And in fact, from the studies I've seen, it might even be up to 50 percent of the women who are conflicted—50 percent of the women who would leave would probably be relieved of the level of stress that they were in and they would probably not abort.

THE COURT: What about the other 50 percent?

THE WITNESS: Of the other 50 percent, there would be a minority who were determined to abort, as I've indicated, and probably most of them would go ahead and abort the next week or at another place or in a private doctor's office or something.

[53] And of the others, they would probably have the level of their conflict raised to a higher place and have more decision-making to do, and probably anybody in that state is, regardless of what they do, going to suffer the consequences of the abortion. If they abort they probably will be more likely to be a victim.

I am talking and it is hard—these mildly stressed or moderately stressed women probably will be relieved if they don't abort, and if they do abort the occurrence of post-abortion syndrome will probably come on more immediately.

THE COURT: Doctor, during the period that these women are required to confront the demonstrators, do you have an opinion with a reasonable degree of medical certainty whether their level of stress would be increased, remain the same, or be decreased?

THE WITNESS: I would say that it would vary, but the level of stress would not be—from that particular incident I don't see the level of stress being great in almost any case, from that particular incident. I feel that the people who are determined have a easy way of resolving getting abortion, otherwise, and so I don't see that as ranking in any high level of emotional stress at all.

THE COURT: In other words, in your opinion, these people would just turn around and casually walk away?

[54] THE WITNESS: No, your Honor. I don't think they would casually. I think they would be angry.

THE COURT: They would be upset?

THE WITNESS: Upset and frustrated.

THE COURT: Don't that increase the level of one's emotional stress, to be angry and frustrated?

THE WITNESS: Yes.

THE COURT: Those go together, do they not?

THE WITNESS: Angry and frustrated may very well go together but I don't believe that the level of anger and frustration would be—

MR. MERCER: If it please the court, we are going to explore this.

THE COURT: Why don't we let the witness finish.

MR. MERCER: Yes, sir.

THE WITNESS: I don't believe that the level of anger and frustration would be of any high-ranking emotional level that's out of the ordinary from the other—of the many stresses that occur in our lives today. I think the stress of having to make the abortion decision is greater, for example. One way or another, no matter who you are, that stress is greater.

The stress of confronting a group of people who are blocking you from going into where you want to go to do what you want to do is annoying, it's maybe anger provoking, [55] it's frustrating, but I don't think it's the material that would make lasting scars.

MR. MERCER: If it please the court, we are going to address these issues more directly when we respond to the particular statements in plaintiffs' witness's affidavit which I think will clarify the issue somewhat more for the court.

Q. Doctor, you've mentioned that your practice in part focuses on treating a syndrome known as PAS or post-abortion syndrome. Would you describe that term more particularly for the court and explain what it means?

A. Post-abortion syndrome is a reaction to a more technically, clinically known syndrome called post traumatic stress

reaction. And in post traumatic stress reaction a precipitator to a serious reaction is something that causes the person to become in a position of crisis of their personality.

Post-abortion syndrome is a crisis which in my experience and reading and discussions with my colleagues appears to me to be almost identical, if not identical to the experience of losing one's baby either through miscarriage or through actual after-birth loss. And it is the experience of intense grieving.

Now, that experience entails shock, denial. It experiences a very high-level sense of anger, usually [56] directed at the person who is blamed for provoking that experience. So that in the case of a woman who—well, the man, the father of the child, it's very normal and typical for the woman to develop an intense hatred and anger and fury towards that man.

Part of the post-abortion syndrome involves suicidal feelings. So that virtually every person I have worked with who's experienced post-abortion syndrome has very definitely wanted to murder the man and/or the doctor, usually both, involved in the abortion.

THE COURT: Did you want to murder your husband when you went through those abortions?

THE WITNESS: Yes, I did.

THE COURT: Of course you didn't, did you?

THE WITNESS: He is still living.

THE COURT: Do you still live with him?

THE WITNESS: No, he left me within a month.

Q. Within a month of having the abortion?

A. Of the abortion.

Q. Go ahead.

A. He left after a month. He thought I was crazy. He in no way understood what I was going through and he was shocked and upset, and I did express extreme anger and fury at him. And I also wanted very much to kill myself. And as I say, this is—when you speak clinically to somebody who [57] has experienced post-abortion syndrome, it turns out that all of us want to kill ourselves, virtually all of us want to kill ourselves afterwards because we hold ourselves responsible

for the death of our babies which we never anticipated would happen.

Q. This is among those experiencing PAS?

A. People who experience post-abortion syndrome. Some people who experience post-abortion syndrome experience it right away, as I did. Some people experience it after another event in their lives. In my opinion usually an event that is either a death in their immediate lives and/or a female hormonal event. Particularly the birth of another child precipitates post-abortion syndrome in many women.

Menopause precipitates post-abortion syndrome. So that it is not only typical to see a women who comes out of the abortion having this syndrome, but it is also not unusual, and I have several patients who six years later are in deep grieving over the child that they lost through abortion.

And I have heard colleagues tell me about women in their 70's and 80's who have not gone into a deep level of grief over an abortion that may have occurred 50 or 60 years ago, at least acknowledged grief. Because one of the symptoms of post-abortion syndrome is denial and escape from the reality of what the woman is physiologically and [58] emotionally experiencing. So that the woman tries not to be experiencing abortion grief. She is told she is not supposed to experience abortion grief and that it doesn't exist.

And most doctors who do abortions seem to indicate, they do indicate to their patients, as mine indicated to me, that all we have to do is go to sleep that day and go to work the next day and we'll be fine. But the actual experience after an abortion, even for most people I know who feel that the abortion experience was not a disaster for them, they still admittedly suffer reasonably long periods of depression, anxiety, despair, self-hatred and so on.

Q. What kind of consequences might you expect to see with these type of stress symptoms?

A. The consequences of the extreme levels of self-hatred and anger and fury and despair are that the private lives of the individuals are thoroughly disrupted. And we now see that the women who are aborting their children in order to protect the relationship frequently with their lover or hus-

band end up losing their lover or husband within a very short period of time.

Because the woman goes into a state of intense despair, grieving, anger and the man cannot take that. And she directs a great deal of the anger at him and at herself [59] and, men are not prepared, as are women prepared, for this type of extraordinary reaction in a women. And so they frequently—the relationship is put under unusual stress and it is not easy for the relationship to hold after that.

The children become ignored. In my case I couldn't relate to my children any more. I felt I had murdered my babies so that I couldn't relate to my children. I couldn't relate to anything or anybody. And that appears to be a very standard reaction to someone experiencing post-abortion syndrome. So that your life relationships are seriously hampered.

I have women who come in and tell me that they had an abortion but they can't understand why everything is falling apart on them. And I think that if the women's movement, which I consider myself part of, would only become conscious of the extraordinary position women are put in after they are removing the living children from their bodies we would be in a different position.

THE COURT: You feel very strongly about this, I gather?

THE WITNESS: I have very strong women's rights feelings about this.

THE COURT: And you think this impairs and impinges upon women's rights?

THE WITNESS: I think this seriously impairs on [60] women's rights because most women have abortions at the behest of men who consider it an inconvenience and who don't understand that it can be a disaster to the women and therefore to the entire relationship, and to the family.

Q. Given your testimony concerning PAS in general, doctor, in your experience, clinically speaking, what incidence of occurrence of PAS might you expect in a general population of women experiencing abortion?

A. Over the period of time, from immediate on to over the events of a lifetime, I think I can say that about 50 percent of women will experience some definite level of post-abortion syndrome. Immediately, probably about somewhere between 10 to 20 percent of women will have a devastating reaction right away.

Within a few years, within I would say three years, you will already have probably starting to approach about half of the women. We do know that so many women having abortions within a year or so after the first abortion will either have the second abortion or have the baby. What they do is get pregnant again very frequently.

So with all of the terrible stuff you have to go through having the abortion you end up pregnant again. So if you have the baby why did you have to lost the first one? And if you have another abortion now you are starting to get yourself in a position of emotional and physical jeopardy [61] that should not be happening to women.

Q. Doctor, have you had occasion to read the affidavit of Jeanine Michael submitted in behalf of the plaintiffs in this matter?

A. I have a copy here.

Q. Is this a copy of the document that I've just referred to?

A. Yes, it is.

MR. MERCER: As a matter of procedure I am not going to move to enter this because I believe it is already filed among the pleadings, judge.

Q. Would you please turn to paragraph 5 of this document and read that paragraph out loud.

THE COURT: To yourself.

THE WITNESS: To myself?

THE COURT: Yes.

(Pause)

A. Yes, I have read it.

Q. Do you have an opinion regarding the correctness or incorrectness of the matter stated in that question, particu-

larly with regard to the question of emotional harm or damage?

A. I believe that it is very unlikely, it is unreasonable to consider that anybody would have irreparable emotional harm from being turned away from a abortion clinic [62] at all.

Q. Could you explain your reasoning in that, doctor?

A. Well, as I indicated earlier, anybody who really feels at peace with herself in having an abortion not—is probably somebody who thinks pretty actively about what she wants and will not be deterred by a demonstration from doing what she wants to do.

Clearly, the difference—if it were I, I would go to someone else or I would wait the week and the difference between—I would probably simply go to somebody else. But everybody would do their own thing. And I don't see how if a person wanted to the abortion and felt comfortable with it that that would have any irreparable, emotional physical damage to them.

THE COURT: You are talking, as I hear you, about permanent damage, when you say irreparable?

THE WITNESS: Yes, irreparable.

THE COURT: You have already testified, I believe, as I understand it, that at least some women would be angry, frustrated and upset if they were to arrive at an abortion clinic which was being picketed, shall we say.

THE WITNESS: Yes.

THE COURT: Could you assist me by putting some finite dollar value on this stress and upset that would be suffered by the woman between the time it first occurred and [63] the time she could go somewhere else a week later or two weeks later? Could you set some dollar value on that?

THE WITNESS: No more—to set a dollar value is the same as a dollar value of dealing with a company that bothers you with collecting a bill. I don't think it has an impact of high-level stress that is within the realm of

emotional problems that a person would go to a therapist to resolve, for example.

I think it's probably in the realm of societal stresses that occur not infrequently to people.

THE COURT: Is it your testimony then that you could not put a dollar value on this emotional stress?

MR. MERCER: I don't believe that's her testimony.

THE COURT: If it isn't she is going to say so.

THE WITNESS: I don't know that I think in terms of dollar values. I see people for free myself so I don't think emotional stress has a dollar value.

THE COURT: Do you think the person who have been damaged to some extent?

THE WITNESS: I don't think a person would be damaged by a demonstration, no. I do not think they would be emotionally damaged, no.

THE COURT: Not permanently. But how about temporarily?

[64] THE WITNESS: I don't think they would be temporarily emotionally damaged.

THE COURT: You don't think they would sustain any damage at all?

THE WITNESS: I don't think they would sustain any damage.

THE COURT: None whatsoever?

MR. MERCER: I believe she testified earlier that they experienced anger.

THE COURT: I thought she had. Now apparently she wants to change her testimony and that may come from the comment that was made a few minutes ago. They's why I want her to testify.

THE WITNESS: I feel that anger is not necessarily damage to the emotions. I think that anger is a normal response emotionally and I think frustration is a normal part of human experience. So when I think of the term "damage," I think of something that causes a disruption of the ego.

THE COURT: In other words, you don't see that there would be any difference in the effect upon the individual

if she walked up to the abortion clinic and there was no one around and she walked right in as opposed to confronting this demonstration?

MR. MERCER: If it please the court, I don't [65] believe she said that, your Honor.

THE COURT: I'm not sure.

MR. MERCER: This borders on cross-examination of the witness.

THE COURT: It borders on the court attempting to ascertain what is, in my judgment, relevant to her testimony. Would you answer the question if you can?

THE WITNESS: Could you please restate that for me.

THE COURT: Would the court reporter please put the question once again to the witness.

(Record read)

THE WITNESS: I think that clearly this is an event in her life that's annoying. But I think it makes no permanent difference or no serious difference in the person's ability to adjust to life.

THE COURT: Would you say it caused stress? Would it cause stress and upset?

THE WITNESS: I think that it would cause an upset.

THE COURT: Can you measure that in dollar terms?

THE WITNESS: I—I'm not used to measuring stress in dollar terms, but I can measure it in terms of the DSM-III which—the DSM-III R which is the handbook for determining levels of stress psychologically for [66] psychiatrists and psychologists and which in fact classifies post-traumatic stress reaction. And I would say that that experience would not qualify even to the very lowest level of stress inducers to any clinical stress reaction.

Q. Doctor, would you please read question 8 to yourself.

THE COURT: Paragraph 8.

Q. Pardon me, paragraph 8.

(Pause)

A. I have read that paragraph.

Q. Have you formulated an opinion regarding the correctness or incorrectness of the matter alleged in paragraph 8, particularly concerning emotional damage to the women or a woman being entirely shattered when she was touched and obstructed by a few people at the center?

A. Yes, I have. I feel that in terms of any woman who's made the decision and is comfortable with the decision, I feel that it is very unreasonable to assume that that woman would be in any way devastatingly damaged at all by such an occurrence.

In terms of the woman who would get so upset as to react in the extreme way as identified as "entirely shattered," I feel that those are the very women who could not deal with abortion. These are the very women who almost certainly would experience a devastating post-abortion [67] syndrome. And for their own sakes would most certainly benefit from leaving the area and most certainly they will probably, many of them will then by virtue of that experience reconsider and not go into the abortion experience.

But the fact that anybody would be shattered by that simply shows us who the people are who are going to almost certainly experience post-abortion syndrome. And I should hope that the clinic would turn every single one of them away, if they did go in at that point, because clearly that person is not clear in her resolve to have an abortion and should not be victimized by an abortion at that point.

MR. MERCER: Thank you, doctor, I don't have any more questions on direct, your Honor.

MS. WETHERFIELD: Could we take a five minute break?

THE COURT: Yes.

(Recess)

THE COURT: You may cross-examine, Ms. Wetherfield.

MS. WETHERFIELD: Thank you.

**Preliminary Injunction Hearing
October 25, 1988**

DIRECT TESTIMONY OF REV. RICHARD JOHN NEUHAUS

CROSS-EXAMINATION

BY MS. WETHERFIELD:

Q. Dr. O'Callaghan, you testified that you have a general practice in Croton-on-Hudson. Do you practice on [137] word, even though you may not have been the most expert in preparing the affirmation of the prior witness.

MR. WASHBURN: I apologize. It was the lateness of the hour. I should have put "information and belief." It was about 2 a.m.

RICHARD JOHN NEUHAUS, called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WASHBURN:

Q. Pastor Neuhaus, can you tell us whether this is a copy of your curriculum vitae and publications?

A. Yes, it is.

MR. WASHBURN: I have already provided a copy of this to counsel. If I may hand it up to your law clerk and ask that it be received in evidence.

THE COURT: Any objection?

MS. WETHERFIELD: We would stipulate to this.

THE COURT: It will be received. That is Defendant's Exhibit B.

(Defendant's Exhibit B was received in evidence).

Q. Pastor Neuhaus, could you state your educational background?

A. Higher education, I assume you mean?

Q. Yes.

[138] A. Concordia College in Austin, Texas, University of Texas, Concordia Theological Seminary in St. Louis where I

received a master of divinity degree, with graduate work in sociology and ethics at Washington State University and Wayne State University.

Q. Could you please state your involvement if any in the civil rights movement?

A. Yes, I was intensely civil involved in the civil rights movement in the late '50's while still in school and then as pastor of a large black low-income parish in the Williamsburgh Bedfor-Styvesant section of Brooklyn where I was for 17 years and during the '60's was intimately involved in various aspects of the civil rights movement both in the city and other parts of the country.

Q. Did that involvement include involvement with the Reverend Martin Luther King Jr. in sit-in demonstrations?

A. Yes, I was involved with Dr. King early in the '60s on a number of occasions in the South and then later from '65 on served as liaison with Dr. King between his Southern Christian Leadership Conference and various aspects of what we then called the movement here in New York up until his death in April 1968.

Q. Were the sit-ins in various parts of the nation a part of the civil rights effort which led Congress to adopt the Civil Rights Act of 1964?

[139] A. Well, that's generally assumed to have been the case in the judgment of most historians which I would agree with. Certainly it was our intention that it influenced legislation.

[139] Q. And you were personally involved in that movement?

A. Yes, certainly.

Q. So when you say it was the intention of that movement, you are talking from your personal experience?

A. It was my intention and the intention of others with whom I was working.

Q. Did large civil fines such as were used recently in the city of Yonkers case against City of Yonkers officials play a part in those days in the effort to prevent or control sit-in demonstrations or marches or other civil rights activities?

A. With respect to the particulars of the Yonkers case I know only what I read in the press. But the use of fines in order to threaten financial ruin so to speak were in reality, no, that was not a government response and I'm sure would have occasioned enormous national outcry had it been tried. Just as there was national outcry against the use of police dogs and fire hoses and other ways to discourage the expression of conviction.

Q. Have you become familiar in any way with the [140] Operation Rescue demonstrations here in New York City and Atlanta and so forth?

A. Again, chiefly from what I read and see in the general media plus I follow very closely the literature on all sides of the abortion debate at our center of which I'm director, the Center on Religion and Society. That's part of our responsibility, to follow that and comment on it. So to that extent I hope I'm reasonably familiar, yes.

Q. And would you yourself participate in such a demonstration?

A. No, I think not. At least not at this time.

Q. And do you consider Operation Rescue to be in the nature of a civil rights demonstration? And if so, why?

A. Well, yes, in that it formally speaking is an effort to draw attention to what is perceived as a great injustice and to call for the remedying of that injustice.

The injustice being a denial not simply of civil rights but of the most elementary right to life as it is said. So in that sense there would be very powerful analogies indeed.

MR. WASHBURN: Thank you, no further questions.

MS. WETHERFIELD: Your Honor, with all due respect to Pastor Neuhaus I would move to strike all the testimony. It seems to have no relevance at all in this evidentiary hearing.

[141] THE COURT: That motion is denied. I will take it for what is is worth.

MS. WETHERFIELD: Thank you, your Honor.

THE COURT: Do you wish to inquire?

MS. WETHERFIELD: I do have one question, your Honor.

CROSS-EXAMINATION

BY MS. WETHERFIELD:

Q. Pastor Neuhaus, you seem to have some hesitation in talking of Operation Rescue as a civil rights movement. In what sense were—you said that you were regarding Operation Rescue at least in a formal sense as a civil rights movement. In what sense? Why were you hesitating? What is it that stops you from—

A. If I understood the question, and I may not have understood it correctly, is that I call Operation Rescue a civil rights movement in the sense that what we were engaged with in the 1950's and '60s was a civil rights movement and I was trying to be as precise as I could. Formally it is in terms of the nature of the protest and that use of civil dissonance or, as some prefer, civil disobedience in order to protest a great injustice is one that of course has many parallels in American history. It is not limited to simply [142] the most 1950's, '60's phase of the civil rights movement. That formally is a strong parallel between something like Operation Rescue and what we were doing in Brooklyn or in Selma, Alabama.

Q. Pastor Neuhaus—

A. If I may add, substantively, the point I tried to make is that there is a similarity or even a parallel, stronger than simply an analogy, in that both are dealing with the question of rights and protesting a perceived violation of rights. So both formally and substantively I think yes, there is a strong similarity indeed parallel between the two.

Q. And in Selma and in Brooklyn did you or anybody else in the civil rights movement ever blockade access to health facilities?

A. To health facilities?

Q. To health facilities.

A. Certainly that was not the intention. Of course I wouldn't think that Operation Rescue would view itself as blocking access to health facilities, I—

Q. That's the answer to the question.

MS. WETHERFIELD: I have no further questions.

THE COURT: Anything else before we excuse the witness?

MR. WASHBURN: I have no further questions, your Honor.

Exhibits Regarding Operation Rescue

QUESTIONS AND ANSWERS
concerning
OPERATION RESCUE

LOCATION/ACCOMMODATIONS

Why is Operation Rescue in New York City?

Because New York City is one of the largest abortion capitols in the world. Hundreds of babies are killed daily. Also, New York City is the media hub of the free world.

Where will I stay?

We've made accommodations in several locations for large groups to stay at very reasonable prices, ranging from \$15 to \$25 per night. Contact us for details.

What if I can't afford it?

Sponsor cards have been made to help you raise the money from friends and churches. You will find many people in sympathy with Operation Rescue who can't go themselves, but would be glad to help send you.

Is there any free housing available?

Yes, but it is very limited. We would prefer rescuers to stay at large facilities, because it is easier to communicate with and mobilize large groups. However, there are some homes available, at very low or no cost.

If I travel by plane, bus, or train, how will I get to where I'm staying?

Your best bet is to take a taxi.

How and what will we eat?

Expect to eat a light breakfast and lunch on rescue days. We suggest you bring a good supply of dried fruits, nuts,

snacks, etc. that can be eaten at the rescue site. Supper will be eaten at area restaurants.

How much money should I carry on my person?

A few dollars should be kept for unexpected travel expenses, or food.

Do we have to stay the entire week?

If it is not possible for you to stay because of other pressing matters, we understand and would gladly have you come for any portion of the week. However, we would prefer that as many as possible stay the entire week, so that we don't have a drop-off in the numbers as the days progress.

THE RESCUE

How will we get from our hotel, etc., to the rescue site?

New York has an excellent public transportation system. You can take either a train (subway), or bus. All abortion sites are close to a train depot or bus stop. Each group will have guides with maps who are familiar with the area. Groups will meet together before leaving for the rescue site to insure that everyone is there, aware of the plans, and then the entire group will travel together to the rescue site.

If you are in a home, your host will escort you to a location where a guide will take you the rest of the way.

What will happen at the rescue site?

Exciting things!

- 1) Rescue marshals will tell you where to sit and kneel. Attempt to stay with people you know, and make friends with those you don't know.
- 2) Once in place, please follow the directions of the prayer/song leader.
- 3) No one is to shout at, touch, or even talk to the police, clinic personnel, clients, media people, passerbys, etc. Spe-

cific people will have those responsibilities. We must have order.

- 4) If anyone breaches this agreement, rescue marshalls have been instructed to insure compliance. Violators will be asked to leave, and escorted from the rescue site.
- 5) In the event that it becomes necessary to move a few feet, follow the directions of rescue marshalls in a calm, orderly manner.
- 6) If arrests are made, most people will go passively limp, to buy time for the babies. This is recommended, but not required. At that time, no one should in any way physically struggle with the police, or use rude or antagonistic speech.
- 7) If the police attempt to arrest only rescue marshalls, and then disperse the crowd, the goal you must have is to keep the doorway occupied. Use common sense, keep calm, but do your best to keep moving toward the door on your knees.

If I am arrested, what will happen to me?

We can't be 100% sure, but a likely scenario is that you will be taken to a precinct, charged, and released in your own recognisance, without posting bail.

What if they demand bail?

We cannot tell you what to do, but we are suggesting that no one post bail for two reasons:

- 1) We don't want a lot of our money tied up in bail.
- 2) In other large rescues, when pro-lifers stood together and refused to pay bail, they were released shortly anyway, because there was no room to keep them.
- 3) Even if we were kept in jail a day or two for refusing to pay bail, it would be a **tremendous testimony** to millions of Americans that people still exist who are willing to stand up for what is right, and suffer for their fellow human beings, the babies.

What will I be charged with?

The likely charges are trespassing, and/or possible disorderly conduct, both of which are violations in New York State law, **not misdemeanors**.

If we are arraigned before a judge, what should I plead?

Again, we cannot tell you what to do, but we strongly suggest that you enter a **not guilty** plea. By trying to save children's lives, we are certainly not committing a crime. The law recognizes the right of citizens to break a lesser law to prevent harm, injury, or death from happening to another individual.

Besides these probabilities, there are remote possibilities such as:

- 1) Everyone being held overnight to be arraigned the following day. In this case you would be with other believers, and you could have an all night prayer meeting.

NOTE: Being held overnight is highly unlikely because of overcrowding in the jails, and because of the cost to the city for feeding all of us.

- 2) It is possible, but very unlikely, that those who go passively limp could be charged with resisting arrest (a misdemeanor).

NOTE: This charge is unlikely because it would take the police much more time to process everyone (fingerprinting, etc.). Also, those so charged would be entitled to a jury trial. The hundreds of jury trials, and thousands of dollars in court costs make it a real bother to the city of New York. Finally, it is almost inconceivable that a New York jury would find someone guilty of resisting arrest, because they went passively, politely limp.

- 3) Another possible scenario is that the police would bus us to another area and release us without making arrests. This would be done to avoid the time and annoyance of arresting several hundred people.

NOTE: You will find many if not most policeman to be friendly and sympathetic to the plight of pre-born children. We must be friendly and Christ-like with all the police, remembering that mercy triumphs over judgment.

- 4) Each night there will be a rally/prayer meeting (location to be announced) for prayer, fellowship, encouragement, reviewing the days events, and for new directives. These promise to be exciting evenings. Attendance is required by all!

THE LEGAL SYSTEM

Will I have to return for trial?

We don't know, but probably not.

- 1) The lawyers may be able to enter an Alford plea (similar to no contest) on behalf of the rescuers.

However, if some of us are brought to trial, it would give us a platform to further expose and decry the injustice of killing innocent children. The cause of the children would benefit from such trials.

Most trial judges, however, would do all they can to avoid clogging their courtrooms with pro-life activists.

- 2) It is possible that any charges brought would be dropped, in order to avoid the expense and inconvenience of any courtroom time.

Will lawyers be provided for the rescuers?

Yes.

Will there be a charge for legal counsel?

If there is a charge, it will be minimal.

Can I get my own lawyer if I want?

Yes.

Can I defend myself if I want to?

Yes.

Will I spend time in jail after trial if I am found guilty?

The probability is almost non-existent. The interactions we might be charged with are minimal and the jails are already overcrowded.

Will I be fined?

This is a probability. Any fine imposed would be minimal.

How long could all this legal stuff take?

Months, and maybe even over a year. Courts are overloaded with cases right now.

The most likely scenario is that any who are arrested (even several times) would be offered a deal. The deal would probably be something like this: enter an Alford plea for one charge, pay a small fine, and all other charges would be dropped. Your appearance in court would probably not be necessary.

MISCELLANEOUS QUESTIONS

Are there similar rescues planned for other cities?

We are considering other cities, but we first have to recruit people for New York. However, it is our hope and prayer that New York will encourage and inspire believers in other cities to have their own local rescues of 50, 100, 200 or more people.

Should we bring our children?

We strongly suggest you leave young children at home with relatives, etc. There will be too much going on in New York for you to also have to be directly responsible for your children.

Could teenagers participate?

This is strictly up to the parents of the teenager.

CONCLUSION

Hopefully, this pamphlet has answered any questions you have about Operation Rescue. We are excited over the blessing of God that is on this project. In reality, we are not asking Him to join our battle; He is asking us to join His battle. They are His children.

Aside from all the bad publicity and hype you've heard about New York City's streets and subways, you should not be afraid. We will always be traveling in groups, and literally millions of people use the public transit system everyday without fear or incident. But our real protection lies with our Heavenly Father. The Lord is our Sheperd! Amen. And He is well able to protect us, whether in New York, Binghamton, or Anytown, U.S.A.

New York is a huge, diverse, sad city. Bob Ayala sings "Lord, won't you come out to New York? Come to the city of power, the city of pain." New York is the hub of the media for the free world. It is the abortion capitol of the eastern United States. It is the city where we must go to testify with our actions of God's unchanging, transcendent moral law. It is where we must go to confront this slaughter with our very bodies.

We must be courageous, determined, willing to take risks and make sacrifices. Twenty-five million children are dead, with thousands more dying daily. It is long overdue that we rise up in this manner and put an end to this holocaust. Operation Rescue in New York City could mark the beginning of the end of legalized abortion in America, by igniting courage in the hearts of decent Americans across the country to obey the laws of God, of nature, of common sense and decency. This new found courage will enable them to rise up in like manner.

It wouldn't take millions. Just a few thousand dedicated souls, pastors being a part, who will say "Enough is enough—the killing must stop."

Then when victory is accomplished for the babies, we will say, along with Deborah:

*"That the leaders led in Israel,
That the people volunteered,
Bless the Lord!"*

Send in your response card today indicating you will be coming, and we will contact you with more details. Recruit a friend to come with you. See you in New York!

OPERATION RESCUE BEGINS WITH A MASS RALLY/
TRAINING SESSION ON SUNDAY MAY 1, 1988 AT
3 PM. RESCUES ARE PLANNED FOR MONDAY THRU
FRIDAY AND POSSIBLY SATURDAY. SITES OF ALL
EVENTS TO BE ANNOUNCED LATER. FOR FURTHER
INFORMATION ABOUT ANY ASPECT OF OPERATION
RESCUE CONTACT YOUR LOCAL PROLIFE GROUP
OR LOCAL NYC COORINATOR: PROLIFE NONVIO-
LENT ACTION PROJECT P.O. BOX 368 BRONX, NY
10475 (212-379-4329); OR CONTACT NATIONAL HEAD-
QUARTERS DIRECTLY AT:

OPERATION RESCUE
P.O. Box 1180
Binghamton, NY 13902
607-723-4012

**JOIN US IN OPERATION:
RESCUE**

APRIL 30-MAY 7, 1988

WHAT IS OPERATION RESCUE?

Operation Rescue is one of the most important and exciting events in the battle against abortion. It is a nationally organized opportunity for God-fearing people to stand up for pre-born children, and join together in the largest rescue mission in pro-life history. Thousands of people from across the country will join forces in New York City from April 30 to May 7, 1988, to peacefully close down abortion mills. We will gather around abortuaries on our knees, begging God to forgive America for the blood of twenty million children that is already crying from the ground, and asking Him to turn this nation back to Him. Operation Rescue is *pledged* to be peaceful and non-violent.

**We don't act like killing
children is murder!**

IMAGINE . . .

Use your imagination to see hundreds and hundreds of people around an abortion mill, praying and singing. Imagine huge banners unfurled in the wind, declaring "Operation Rescue" and "No More Dead Children". See the heartbreaking sight of several babies, victims of abortion, gently laid out in small coffins for the world to see. Sense the inspiration of 60, 80, 100, 200 pastors and priests, leading God's people in this event. Envision millions and millions of Americans watching this awesome sight on TV, night after night.

Imagine a rescue mission so well-organized, so well-managed, with the participants so calm, free of hateful or bitter words, not portraying a vengeful heart, but a broken

one; participants so decent and upright that the American people are forced to consider the *reasons for their actions*, and the *merits of their arguments*.

See the members of the House, the Senate, the White House, the Supreme Court reading front page reports of God's people peacefully, yet with determination, **demanding** an end to the killing.

Even picture, if you will, a *wave of righteous uprising* spreading across America. A move so large, so encompassing, that politicians have to decide between jailing thousands and thousands of good, decent people, or making child killing illegal again! Judges and politicians *could not* withstand a groundswell of such strength. The Constitution would be amended, and child killing would be illegal again.

OBEYING GOD'S WORD

Most importantly, we are obeying God's command to "Rescue those who are unjustly sentenced to death" (Proverbs 24:11). No Supreme Court ruling can ever nullify God's commands, or our duty to obey His commands. The Scriptures consistently teach that when man's law and God's law conflict, "We must obey God rather than men" (Acts 5:29. See also Exodus 1:15-2:10, Joshua 2:1-16, Daniel 6:5-10, and Acts 4:15-20).

This is the Biblical basis for action that Corrie ten Boom and her family had, and that of Christians who ran the underground railroad smuggling black slaves to freedom in Canada. While both sets of actions put them in conflict with man's law, they knew that had to obey God rather than man.

Even the laws of man acknowledge that at certain times people may break certain laws to avoid a greater evil. We are simply being good, moral citizens by preventing the evil of aborting children.

CHILDREN WILL BE SAVED

We will arrive early in the morning, day after day, at given abortion mills, surrounding them with our bodies. This will prevent abortion mill employees or pregnant mothers from entering in to kill their children. Sidewalk counselors will be prepared to talk to the mothers, and take them to a pregnancy help center for further counseling and help. Many children around the country have been saved from death by rescue missions such as this.

WILL I BE ARRESTED?

It is possible, but we don't know. We will not be going inside these death camps or destroying equipment or property. We will simply kneel and sit on the grass and/or sidewalk around the building, preventing people from going in. This could result in arrest. However, 1000 or 1500 people peacefully praying around an abortion mill will be *very difficult* to arrest! In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved.

God's people are peacefully
demanding an end to
the killing.

BUT WHAT IF WE ARE ARRESTED . . .

If we are arrested, it would be a tremendous testimony to millions of Americans and their political representatives, that people still exist who are willing to stand for their fellow human beings, even at personal risk. If 1500 people spend a day in jail together, it would be an inspiration to multitudes of Christians to take a stronger stand for the children.

In short, one of the greatest things *that could ever happen* in the cause of the children would be for hundreds and hun-

dreds of decent citizens to be in jail together for a day or two, for trying to rescue children from death. In the civil rights movement, the sight of hundreds and hundreds of blacks jailed together for peaceful protest against the injustice of segregation, helped with the sympathy of the nation to their cause.

**Many children have been
saved from death by rescue
missions such as this!**

THE POLITICAL ANSWER

Some people will say that these activities are counter-productive, that the real solution must be achieved politically. While it is true that ultimate victory will be a Constitutional amendment to outlaw all child killing, the question is, how do we get there? Over fourteen years of mostly education and political lobbying has gotten us virtually nowhere. Over 20 million children are dead, and the situation is deteriorating. Euthanasia and infanticide are commonly practiced, school sex clinics are being established, and a political solution is as far away as ever.

Even a brief overview of American history will prove that political change usually comes after social upheaval. The government receives its power from the *consent* of the governed. The birth of America, the end of slavery, women's voting rights, the repeal of the Eighteenth Amendment (that outlawed alcohol), the civil rights movement, the anti-Vietnam war movement, and the feminist movement all testify to one truth: that whether for good or bad, political change comes after a group of Americans bring enough tension in the nation and pressure on the politicians that the laws are changed.

Politicians see the light after they feel the heat! Operation Rescue will provide godly people a fresh platform for lobbying their politicians to end this holocaust. **This could be the**

beginning of a righteous, peaceful uprising of God-fearing people across the country that will "inspire" politicians to correct man's law, and make child-killing illegal again.

Time is running out for
America.

HOW VICTORY WILL COME

Up until now, the pro-life movement has mostly been like the boy who cried, "Wolf!". Our cries of "murder" go unheeded by the public and politicians because our actions betray our words. We don't *act* like killing children is murder! However, when the nation sees hundreds and hundreds of people kneeling and sitting around a death camp, possibly risking arrest for these children, they will begin to take seriously our claims that abortion is murder. Credibility follows in the wake of sacrifice.

Victory will come when Christians and God-fearing people across the nation rise up with one heart and voice, *compelling* America to restore justice to the children. The 1988 political race is *critical* in that pursuit. If thousands and thousands will answer the call to battle, peacefully but physically closing down abortion mills across the country throughout the spring, summer, and fall of 1988, we will force the elections to revolve around the plight of the children.

Beyond that, we could *then* provide the necessary clout and momentum to insure that the first item of business for the 1989 congress is amending the Constitution to outlaw abortion! History proves and common sense confirms that victory for the children can and will come in this way. Envision it, and commit *yourself* to making it a reality.

WHAT IS AT STAKE?

Time is running out for America. If we don't end this holocaust very soon, the judgment of God is going to fall on

this nation. Judah was destroyed because some Jews killed their own children and others stood passively by and didn't try to stop them. (See II Kings 24:1-6, Ezekiel 16:20, 21, 36, 38, and Leviticus 20:1-5.) We are *all* guilty of letting this holocaust continue, and we will all share in God's punishment upon America, whether it be drought, war, AIDS, financial collapse or some other calamity.

Your standing for America's pre-born children means you are ultimately standing for *your future, your children, your freedom*, and the very survival of America. There are sacrifices to be made in order to fight this battle, but the cost of *not* fighting will be *much higher* in the long run. The survival of America is at stake.

WILL YOU JOIN US

Be a part of Operation Rescue! Operation Rescue was born in the heart of Randall A. Terry, the Executive Director of Project Life and national organizer of this event. Operation Rescue is co-sponsored by the following organizations:

Advocates For Life; *Andrew Burnett*, Portland, OR
American Life League; *Judie Brown*, Stafford, VA
Council for the Sanctity of Human Life; *Joseph Foreman*,
 Valley Forge, PA

Direct Action Committee; *Kathy & Craig Hoffer*,
 Atlanta, GA

Life & Family Center; *Andrew Scholberg*, St. Cloud, MN
Omaha Christian Action Council; *Denny Hartford*,
 Omaha, NB

Pro-Life Action League; *Joseph Scheidler*, Chicago, IL

Pro-Life Direct Action League; St. Louis, MO

Prolife Nonviolent Action Project; *Thomas Herlihy*,
 Bronx, NY

Prolife Nonviolent Action Project; *Michael McMonagle*,
 Philadelphia, PA

Prolife Nonviolent Action Project; *John Cavanaugh*
O'Keefe, Washington, D.C.

Much groundwork has been laid to make this a peaceful, prayerful event that captures the attention of the nation.

We desire that Operation Rescue go hand-in-hand with your current activities. We are not seeking to make this an annual event, nor should it be a distraction or substitute for local activism. We hope that rescues of 50, 100, 150, and more will be occurring frequently in major cities all across the nation, and we want to help local communities to that end.

Please join us in body if at all possible. Pray for God's blessing on this historical event, and pray that it is the *beginning* of a wave of massive uprising that dominates the '88 political arena.

Finally, please join forces with us financially. This endeavour is costing thousands of dollars, but it is money well invested. Please give sacrificially to help us rescue children, and rescue America. Make checks payable to Operation Rescue.

Fill out the attached card, committing to be a part of Operation Rescue. A local co-ordinator will be in touch with you.

RULES FOR ON-SITE PARTICIPANT

I understand the *critical importance* of Operation Rescue being unified, peaceful, and free of any actions or words that would appear violent or hateful to those watching the event on T.V., or reading about it in the paper.

I realize that some pro-abortion elements of the media would love to discredit this event (*and then the whole pro-life movement*) and focus on a side issue, in order to avoid the central issue at hand—murdered children.

Hence, I understand that for the *children's sake*, this gathering must be orderly and **above reproach**.

Therefore . . .

- 1) As an invited guest, I will co-operate with the spirit and goals of Operation Rescue, as explained in this pamphlet.
- 2) I commit to be peaceful and non-violent in both word and deed.
- 3) Should I be arrested, I will not struggle with police in any way (whether deed or tongue), but remain polite and passively limp, remembering that mercy triumphs over judgment.
- 4) I will follow the instructions of the Operation Rescue crowd control marshalls.
- 5) I understand that certain individuals will be appointed to speak to the media, the police, and the women seeking abortion. I will not take it upon myself to yell out to anyone, but will continue singing and praying with the main group, as directed.

I sign this pledge, having seriously considered what I do, and with the determination and will to persevere by the grace of God.

Signature

OPERATION RESCUE
1000 and I!

Name _____

Address _____

Phone # _____

Name and phone # of nearest pro-life leader:

Name and phone # of your pastor or priest:

- ☐ I am prepared to risk arrest with over 1000 other Christians in order to rescue children from the violent death of abortion.
(We will contact you about housing, transportation, etc.)
- ☐ I will be present at Operation Rescue to picket and show support for this project.
- ☐ I cannot travel to another city, but I will make the phone calls, or write the letters to congressmen, judges, etc. necessary to make Operation Rescue a success.
(We will contact you with those addresses and phone numbers.)

We are asking all participants in O.R. at every level to give a one-time gift of ten dollars to help cover the costs of this massive project. Please give sacrificially as you are able. Make checks payable to Operation Rescue. Larger gifts are *needed and deeply appreciated.*

Please join us with your body.

Send this response card and your gift to:
Operation Rescue
P.O. Box 1180
Binghamton, N.Y. 13902

HIGHER LAWS



*"We must obey God rather
than men" (Acts 5:29)*

by
Randall A. Terry

There's an old saying, "He who frames the question wins the debate." It's true.

If I asked, "Should Christians break the law?" most Christians would quickly answer "NO." However, if I asked, "Should Christians obey God's Word even if it means disobeying the ungodly laws of men?" many believers would probably say "Yes." Others would be unsure what to do!

Christians who insist we should never break man's law quickly quote the injunctions of Romans 13:1-5 and 1 Peter 2:13-15 to obey civil authority. But does the Bible instruct us to obey the laws of man, *no matter what they say*? Does the Bible give civil government full authority over the lives of God's people, authority even above the Laws of God? Some thorough Bible study shows it does not.

A critical error is made by Christians who believe the Bible teaches we must always obey the laws of man. They *wrongly*

assume Romans 13 and 1 Peter 2 to be the only passages dealing with our responsibility to civil authority, ignoring other scriptures that balance this issue.

For example, if God never wanted His people to disobey civil authority, why did He approve of the Hebrew midwives, Moses' parents, and Rahab the harlot when they defied the commands of kings?¹ Why did God bless the three Hebrew children, Daniel, the magi, and the apostles when they "broke the law" by disobeying the order of earthly rulers?² In fact, Hebrews 11 lauds Moses' parents and Rahab as heroes of the faith because, in a time of crisis, they chose to obey God over the laws of men.

Romans 13 does not deal with the question of what believers should do when a government abandons its God-given responsibility to punish the evil and reward the good, and begins to punish the good while rewarding and protecting the evil. At those times, the Biblical examples we've seen give us abundant testimony that God *expects* us to obey Him and to disobey the ungodly laws of man. I call this the "Higher Laws" principle.

The cases mentioned show two basic reasons to defy civil authority: 1) to save someone's life, and 2) to remain faithful to God. These should be our criteria too.

That brings us to a present-day application of this principle: rescue missions at abortion clinics. A "rescue mission" is a group of God-fearing people saying, "NO! We're not going to let you kill innocent children," and peacefully but physically placing themselves between the killer and his intended victims. The rescuers may go right inside the abortion procedure rooms (before the patients arrive) and lock themselves in. They may fill up the waiting room, or they may come before the abortuary opens and block the door on the outside, so that no one can get in. Meanwhile, prolife counselors, whether inside or outside the abortuary, can talk with the mothers scheduled to abort their children, win their confi-

1 Exodus 1:15-2:10, Joshua 2.

2 Daniel 3&5, Matthew 2:1-12, Acts 3&4.

dence, and offer them help. Sometimes it takes the police hours to remove the rescuers, which gives the prolife counselors plenty of time to reach the mothers—*time they would not have had any other way*. Many children are *alive* today because of rescue missions—children who would not have been saved simply by sidewalk counseling or picketing.

In case you haven't guessed, rescue missions are "breaking the law." Rescuers are almost always arrested and charged with trespass or disorderly conduct.

Some might wonder if rescues are a valid application of the "Higher Laws" principle. Some believe we can disobey earthly rulers only when we are told to *do* something evil. "When they tell me I have to abort *my* child, I won't obey." But what about when we are told to *not do* the good God commands us to do, and we thereby commit the sin of omission? Rahab was told, "Don't hide the spies." Daniel was told, "Don't pray." The apostles were told, "Don't preach." And we are told, "Don't interfere with the killing of these children. Don't trespass!"

Yet God has commanded His people, "Rescue those who are unjustly sentenced to death,"³ and "Rescue the weak and the needy; deliver them out of the hand of the wicked."⁴

To rescue someone is to physically intervene on his behalf when he is in danger. We have an obligation before God to try to rescue these children. Christians who do rescue missions are simply obeying God's command to rescue the innocent who are scheduled to die that day, regardless of man's godless law that permits and protects murder.

We have a rich heritage in church history of obeying God rather than man. Thousands of Christians went to their deaths in the first three centuries for refusing to submit to mandatory emperor worship. In the last century, Christians took part in the illegal "underground railroad," which smuggled Blacks to freedom in the northern United States and Canada. During World War II, Corrie ten Boom's family, at the risk of their lives, illegally hid Jews from the Nazis.

3 Proverbs 24:11.

4 Psalms 82:4.

We applaud the courage of these saints, but will we follow their example? We consider them to be heroes but will we apply to our lives the principles that guided them as we face this holocaust of children?

Some people in the prolife movement claim that rescue missions are counterproductive, that the real solution must be achieved politically. While it is true that ultimate victory will be a constitutional amendment to outlaw all child killing, the question is, how do we get there? Over 14 years of mostly education and political lobbying has gotten us virtually nowhere. *Over 20 million children are dead*, and the situation is deteriorating. Euthanasia and infanticide are commonly practiced, school sex clinics are being established, and a political solution is as far away as ever.

Even a brief overview of American history proves that political change usually comes after social upheaval. The birth of America, the end of slavery, women's voting rights, repeal of prohibition, the civil rights movement, the anti-Vietnam war movement, and the feminist movement all testify to one truth: whether for good or bad, political change comes after a group of Americans bring enough tension in the nation and pressure on politicians that the laws are changed. Politicians see the light after they feel the heat!

The truth is, we don't stand a chance of ending this holocaust without righteous social upheaval occurring across the country that "inspires" politicians to amend the Constitution. Right now they have no reason to. The status quo is peaceful. But if even one percent of the evangelical and Catholic community (about 800,000 people) would take their own rhetoric seriously ("Abortion is murder!") and start acting like children are being killed, things would change. By doing *massive* rescues, we could create the tension needed to turn the tide. When government officials have to choose between jailing tens of thousands of good, decent citizens, or making child killing illegal again, they will choose the latter, partly because there are no jails big enough to hold us if we move together in large numbers!

On God's clock, time is running out for America. The blood of 20 million children rises in a deafening chorus

against us. We should not rejoice at God's imminent judgment, for it will begin in His household.⁵ As far as heaven's court is concerned, the church's inactivity and silence on behalf of the children make her an accomplice to their death.⁶

The outbreak of political and judicial persecution against the church and our religious freedoms is the beginning of God's judgment against us. We've bowed the knee to a system that permits and endorses killing, so God is handing us over to the system we've bowed to. We've refused to protect the innocent, so God is removing His mantle of protection from us. If we don't repent, rise up and defend the children, the persecution will increase dramatically.

I'm often asked, "Are we going to win and make abortion illegal again?" I don't know. I know we *can* win. The question is, are Christians, are *YOU*, willing to make the sacrifices necessary to bring victory? I pray we will be. For if we don't pay the price now, we'll pay a much higher price in the near future. The very survival of America as we know it is at stake. And our children will hold us responsible for *their* lost freedoms.

**IF YOU BELIEVE
ABORTION IS MURDER,
YOU MUST ACT LIKE
IT IS MURDER!**

If you want to be involved in this work, want to start a pro-life work in your area, or would like us to do a presentation in your church, Bible study, youth groups, etc.

Please contact us.

For information on other prolife materials or more copies of this tract contact:

Project Life
P.O. Box 1180
Binghamton, NY 13902
(607) 723-4012

5 1 Peter 4:27.

6 Psalms 82:1-4.

OPERATION RESCUE

"Rescue those who are unjustly sentenced to death. . ."

Proverbs 24:11

In New York City: (212) 685-3924

NEW YORK

The beginning of a peaceful national upheaval
to end legalized abortion.

QUESTIONS AND ANSWERS

1. *WHAT IS OPERATION RESCUE?*

OPERATION RESCUE is a coalition of pro-life pastors and lay organizations of all faiths, mobilized to stage massive and peaceful sit-ins around abortion clinics to save the lives of innocent children. **HUNDREDS OF ARRESTS ARE EXPECTED!**

2. *WHEN IS OPERATION RESCUE?*

This phase of OPERATION RESCUE is May 2 to May 6.

3. *WHERE?*

The New York City area.

4. *HOW MANY ARE EXPECTED TO PARTICIPATE?*

800 to 1200, from the New York City area and about 20 States.

5. *WHAT IS THE PURPOSE OF OPERATION RESCUE?*

- a. To save about 30 mothers and babies—per abortion site, per day—from the violence of abortion.
- b. To call America to repent for allowing 20 million children to be slaughtered since 1973.
- c. To call upon America to reject any candidate, including Dukakis and Jackson, who does not oppose abortion.

6. *WHAT WILL FOLLOW NEW YORK?*

Major sit-ins are planned in at least 8 metropolitan areas throughout the Spring and Summer of 1988. This will save hundreds of lives and involve thousands of people willing to risk arrest in order to protect the unborn.

PHOTO CAPTIONS

PHOTO A: RANDALL A. TERRY
FOUNDER AND NATIONAL DIRECTOR
OPERATION RESCUE

PHOTO B: THANKSGIVING WEEKEND RESCUE
CHERRY HILL, N.J.—1987

A portion of the 300 pro-life activists who participated in the sit-in which closed the Cherry Hill Women's Center (abortion clinic) for one day.

No babies were killed—several pregnant women accepted referrals to pro-life Pregnancy Aid Centers—and 210 rescuers were arrested by the Cherry Hill Police.

OPERATION RESCUE
IN MANHATTAN
(212) 685-3924

Preliminary Injunction Hearing
October 25, 1988

ARGUMENT OF COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 RJW

NEW YORK STATE NATIONAL ORGANIZATION,
FOR WOMEN, *et al.*,

Plaintiffs,

—v.—

RANDALL TERRY, *et al.*,

Defendants.

October 25, 1988
10 a.m.

Before:

HON. ROBERT J. WARD,

District Judge

APPEARANCES

NOW LEGAL DEFENSE & EDUCATION FUND
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Attorney for plaintiffs

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Attorney for defendants

JOSEPH P. SECOLA
GEORGE J. MERCER,
*The Rutherford Institute
of Connecticut
Attorneys for defendants*

(In open court, case called)

THE COURT: The first matter will be the plaintiffs' motion to modify the injunction. I'll hear argument from the movants and then from the opposing counsel, and I would appreciate if counsel, among other matters would address the matter of whether an evidentiary hearing is appropriate based on the factual posture of the matter.

If I determine that it is, we will proceed to that phase of the proceeding immediately after we conclude the initial oral presentations. I'll hear first from counsel for the movants then from counsel for the defendants.

* * *
* * *

[27]

MS. WETHERFIELD: Thank you, your Honor. Secondly, if your Honor believes that there is a disputed issue of fact we

would obviously not dispute that an evidentiary can be had. I don't believe that I have heard anything from Mr. Secola that approaches an offer of proof as to a disputed fact, but be that as it may. If an [28] evidentiary hearing is to go forward we would like to call Dr. Thomas Mullin of the Eastern Women's Center who swore to an affidavit in this case earlier.

Dr. Mullin is prepared for that but he does need 15 minutes to get here in a taxi and we would ask for half an hour's break in which to prepare him. We have never heard of Ms. O'Callaghan, she doesn't appear to be cited in any of the papers that Mr. Secola presented to us on the psychological effects allegedly of abortions. So if we might have that half an hour in which to prepare our cross-examination, we would be very grateful.

MS. WETHERFIELD: We have nothing further, your Honor.

THE COURT: We will take a recess at this time and I'll proceed when both sides tell me you are prepared to proceed.

MR. SECOLA: Thank you, your Honor.

THE COURT: It is my understanding that the plaintiffs' witness is not here. The defendants' witness, Dr. O'Callaghan is present. I propose, under the circumstances, to proceed to hear from Dr. O'Callaghan will a hand.

Is there an objection?

MR. MERCER: If it please the court, yes, there is. We believe the defendants would be prejudiced by this. [29] The plaintiff is the moving party and they should go forward with the evidence first. That's a simple requirement of due process, thank you, your Honor.

THE COURT: Let me suggest something, counsel. Let me assume for argument's sake the plaintiffs do not wish to proceed with any evidence in the first instance. Are you prepared to rest on the present record?

MR. MERCER: No, your Honor, we would like to present oral evidence.

THE COURT: Then I am going to let you present your evidence and let them present rebuttal.

MR. MERCER: Note our objection.

THE COURT: If you were prepared to rest on the present record, then I think that you would have achieved a certain result.

MR. MERCER: I don't understand how that constitutes a waiver of our rights, your Honor. Note our objection, please, a strenuous objection.

THE COURT: It is noted and under the circumstances I will note further that I gave you the opportunity to rest on the present record. You believe under the circumstances that it is necessary to put on witnesses, and I have indicated, under those circumstances, I will afford the plaintiffs the opportunity for rebuttal.

On the other hand, if you had chosen to rest on [30] the record for better or for worse, they would be stuck, shall we say, with the present record. It is very similar to what occurs during the course of a trial. If you do not believe that they made out a prima facie case, you should rest.

If, on the other hand, you are concerned on the subject and wish to put in evidence, then you will put in evidence and they will have the opportunity to put in rebuttal evidence.

MR. MERCER: If there witness has arrived, I presume they can go ahead and put their witness on first?

THE COURT: The choice is theirs at this point.

MR. MERCER: We would object to that, your Honor, also.

THE COURT: Very well. It's not a question, counsel, as I see it of the witness arriving or not arriving. It's a question that their position is they don't really have any desire in the first instance to go forward because they do not believe they

need to sustain a burden of proof. Now you disagree with that.

MR. MERCER: They certainly don't. I think that's a correct statement, they don't want to put on any evidence.

THE COURT: Well, you'll have the opportunity, then to put on your evidence.

APR 3 1990

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, *et al.*,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

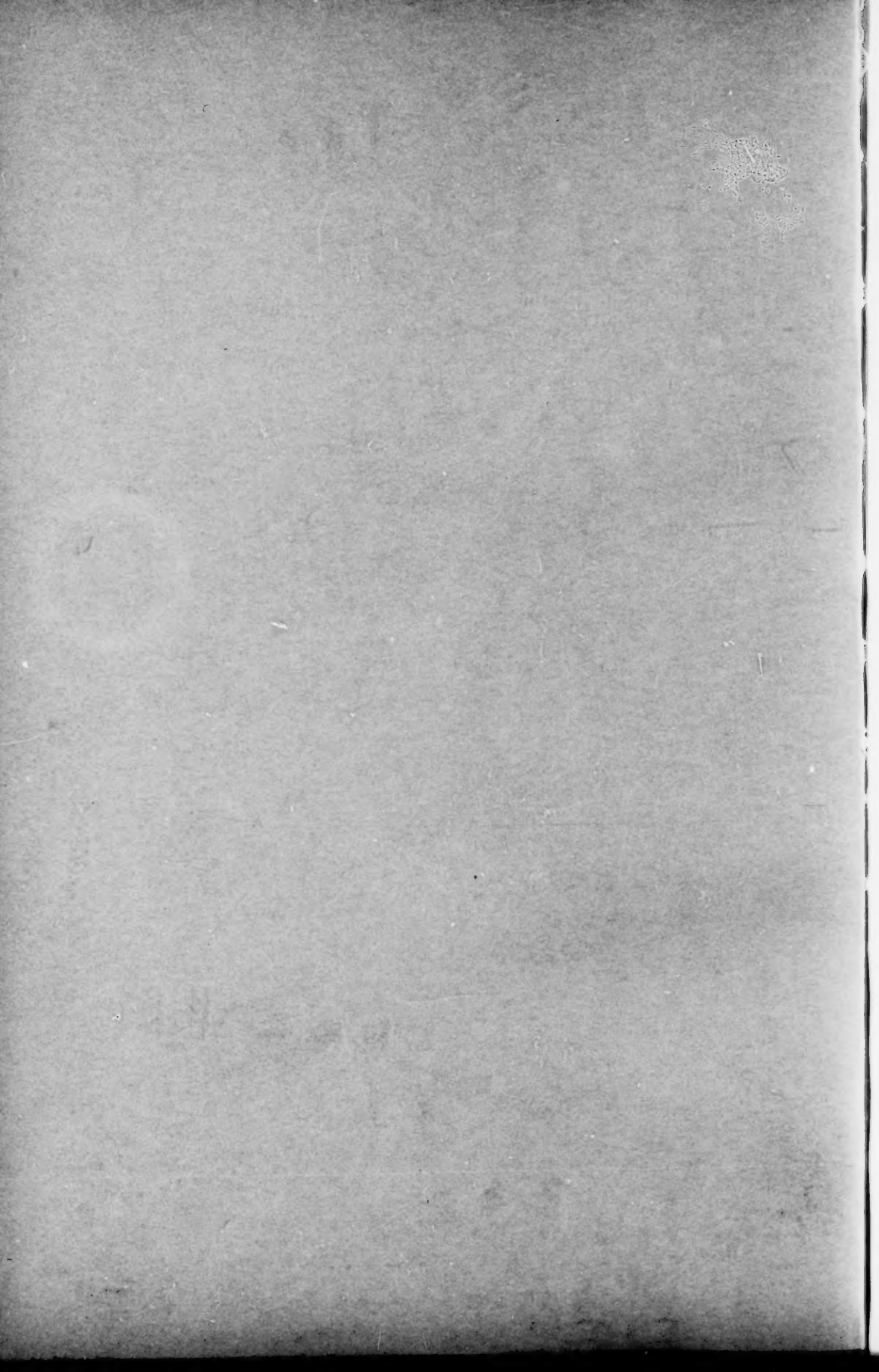
RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether respondents' federal claim under 42 U.S.C. § 1985(3) claim was so "obviously frivolous" as to deprive the district court of jurisdiction to enter judgment on the pendent state claims.

II. Whether prospective contempt fines imposed to coerce compliance, and levied on the basis of admissions in stipulated facts, are civil in nature.

LIST OF PARTIES

Respondents accept petitioners' listing of the parties. In accordance with Rule 28.1 of the Rules of this Court, respondents report that Eastern Women's Center, Inc., Planned Parenthood of New York City, Inc., New York State National Abortion Rights Action League ("NARAL"), Inc., Religious Coalition for Abortion Rights - New York Metropolitan Area, and the National Organization for Women are corporations. None of them have parent or subsidiary companies, but New York State NARAL, Inc. is affiliated with the National Abortion Rights Action League, Inc. and Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc.

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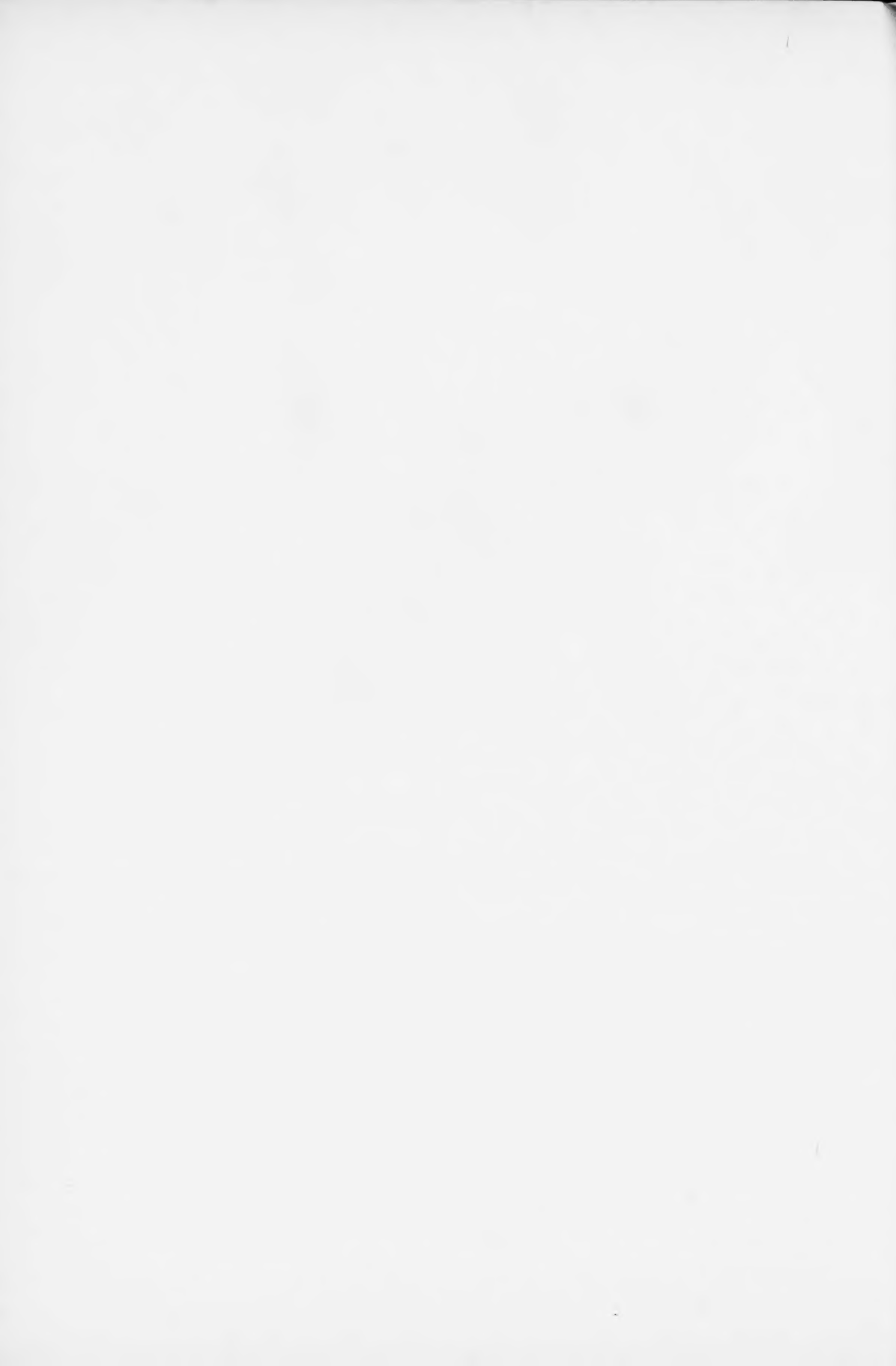
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No. 89-1408

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL TERRY, OPERATION RESCUE, et al.,

Petitioners,

- v. -

NEW YORK STATE NATIONAL ORGANIZATION FOR
WOMEN, et al.,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION



STATEMENT OF THE CASE¹

Introduction

The courts below enjoined organized mobs from physically blocking entrances to health care facilities in the New York City metropolitan area. Every court to address respondents' request for injunctive relief -- the state court in which respondents initially filed their action, the federal district court to which petitioners chose to remove the case, and a unanimous panel of the Court of Appeals for the Second Circuit -- has recognized what is in reality an unremarkable proposition: respondents are entitled to an injunction against petitioners' barring of women's

¹The facts and proceedings summarized here for the Court's convenience are also described in the Appendix to Petition for Writ of Certiorari in the opinions of the courts below. See A5 to A11; A57 to A60; A79 to A83; and A118 to A123.

access to health care facilities because such conduct poses the threat of irreparable harm to women's health.

All of the injunctions issued make clear that petitioners are free to picket and to protest. The injunctions simply bar them from forcibly imposing their will on others by physically blockading access to health care facilities. The conduct threatened and engaged in by petitioners is a far cry from picketing. Petitioners Randall Terry and Operation Rescue have vividly and accurately described what participants are expected to do at Operation Rescue demonstrations, A266, A274:

We will arrive early in the morning, day after day, at given abortion mills, surrounding them with our bodies. This will prevent abortion mill employees or pregnant mothers from entering in to kill their children.

The rescuers may go right

inside the abortion procedure rooms (before the patients arrive) and lock themselves in. They may fill up the waiting room or they may come before the abortuary opens and block the door on the outside, so no one can get in.

Petitioners have also made clear that they understand their actions are illegal, A275:

In case you haven't guessed, rescue missions are "breaking the law." Rescuers are almost always arrested and charged with trespass or disorderly conduct.

1. State Court Proceedings

Respondents are national, state, and city women's organizations suing on behalf of their women members, and health care facilities that provide abortions and health care workers and counselors associated with those facilities, suing on their own behalf and on behalf of their patients. They filed this case in New York State Supreme Court in April 1988, in

response to threats by petitioners' organization, "Operation Rescue," to "close down," by physically blocking access to, medical facilities in the New York City area. Randall Terry, National Director of Operation Rescue, had issued detailed written instructions to Operation Rescue participants directing them to keep the entrances to medical facilities blocked, even if police attempted to move them away.

Respondents sought injunctive relief against petitioners' threatened actions under state law, alleging trespass, intentional interference with business relations, intentional infliction of emotional distress, and tortious harassment. They also sought relief under state civil rights law, N.Y. CIV. RIGHTS LAW § 40(c) (McKinney 1976), and 42 U.S.C. § 1985(3) (1982).

On April 28, 1988, New York State Supreme Court Justice Cahn issued a Temporary Restraining Order ("TRO") that did not include an injunction against blocking access, following a representation made to the court by the New York City police that they would be able to guarantee access to the clinics.

On May 2, 1988, however, Operation Rescue blocked access for five hours to a Manhattan doctor's office that provided abortions. Over 500 participants were arrested. That day Justice Cahn modified the TRO to include an express prohibition of blocking access to medical facilities that provided abortions.

Randall Terry was personally served with a copy of the revised TRO on May 3, 1988. At the time, he was leading a second blockade against an abortion facility in Queens. Terry did not alter his previous

instructions to demonstrators to block access, and the police arrested 416 participants for blocking access to the clinic.

On May 3, 1988, New York City ("the City") intervened as plaintiff in the suit because of its inability to guarantee access through police action. Petitioners then removed the action to the United States District Court for the Southern District of New York.

2. District Court Proceedings

a. May 5, 1988 Temporary Restraining Order

On May 4, 1988, after argument, the district court adopted and modified the state court's TRQ. The court retained the prohibition of blockades, added a provision for coercive civil contempt sanctions of \$25,000 a day, and required petitioners to provide advance notice to the City of the

location of their planned demonstrations. Terry received notice of the terms of this order that evening.²

On May 5 and 6, 1988, Operation Rescue again blocked access to clinics. Terry led both demonstrations, and never altered his instructions to block entrances to the facilities. Petitioners also failed to give notice to the City of the location of either demonstration.

b. Contempt Proceedings Re: TRO

On May 31, 1988, respondents moved for civil contempt sanctions for the events of May 5 and 6. The parties submitted three statements of stipulated facts in which petitioners admitted that they had received notice of the court orders and had nonetheless thereafter physically blocked

²Notice of the order was given orally that evening; the order was signed the next day.

access to abortion facilities on May 5 and 6.

On October 27, 1988, the district court granted respondents' motion for civil contempt against Terry and Operation Rescue on the basis of the stipulated facts, and assessed civil fines against them in the amount of \$50,000.

c. October 27, 1988 Preliminary Injunction

On October 6, 1988, respondents sought further injunctive relief, because Operation Rescue had announced a "National Day of Rescue" for the weekend of October 29-31, during which they intended again to blockade abortion facilities in the New York area, as well as in numerous cities across the country.

The court held two full days of hearings at petitioners' request. After hearing the evidence presented by petitioners and by

respondents in rebuttal, the district court issued a preliminary injunction on October 27, 1988, enjoining petitioners from blocking access to clinics in the New York City area from October 29-31, 1988.

Petitioners nonetheless blocked access to two abortion facilities in the New York City area on October 29, 1988.

d. January 1989 Permanent Injunction

Despite the court's injunctions, petitioners planned another series of blockades in the New York City area for January 1989. Terry wrote a letter to Operation Rescue participants in which he quoted from the district court's opinion in this case, and stated his intention to disobey any court orders:

How will we respond? Will we let this N.Y.C. court intimidate us back into silent cooperation with the killing? Or will we face down this judge's order and declare, "Regardless of your threats, we will continue to save children."?
[sic] I pray it's the latter.

Therefore, after much prayer, thought and counsel, we are asking you to come to New York City on January 12-14, 1989 to rescue the children and mothers, and send a clear signal to the child-killers and the courts, "We will not let you bully us into abandoning children and mothers in New York City, or for that matter, ANYWHERE!"

Appellants' Appendix, filed with the court of appeals, at 586 (emphasis in original).

On January 10, 1989, the district court granted respondents' summary judgment motion and issued a permanent injunction. The injunction was based upon respondents' state law claims of trespass and public nuisance, and their federal claim under 42 U.S.C. § 1985(3).

3. Court of Appeals

Petitioners appealed all of the district court's orders, including the injunctions, the contempt judgment, and a discovery

ruling. On September 20, 1989, a unanimous panel of the Court of Appeals for the Second Circuit affirmed the district court's judgments in all respects, with one exception: where the district court had directed that the coercive civil contempt sanctions should be payable to respondents, the court of appeals held that they should be payable to the United States.

REASONS FOR DENYING THE WRIT

I. THE 42 U.S.C. § 1985(3) CLAIM IS NOT APPROPRIATE FOR CERTIORARI BECAUSE THE JUDGMENT IS FULLY SUPPORTABLE ON ALTERNATIVE GROUNDS.

Petitioners decline to inform the Court of the most important factor in its determination to grant or deny a writ of certiorari: the judgment below rested not only on 42 U.S.C. § 1985(3), but also on the state law grounds of trespass and public nuisance. A137-A139. Petitioners

do not challenge the court of appeals' holding on the state law grounds. Because these alternative grounds fully support the judgment, this Court need not decide the 42 U.S.C. § 1985(3) questions posed by petitioners.

Where a federal question is substantial, that is, not "obviously frivolous," Hagans v. Levine, 415 U.S. 528, 536-37 (1974), the district court has pendent jurisdiction over all state law claims, and can decide the matter on state law grounds. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (where federal and state claims based on common facts, and federal claim is substantial, court has jurisdiction over pendent state claims); Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175, 193 (1909) (where federal court had jurisdiction because of an alleged constitutional violation, it had "the right

to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only").³

Petitioners cannot and do not contend that the § 1985(3) claim is so "obviously frivolous" and foreclosed by prior decisions of this Court as to defeat subject-matter jurisdiction. In fact, as

³See also Oneida Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974) (court has pendent jurisdiction over state claims unless federal claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"); Northern Va. Women's Medical Center v. Balch, 617 F.2d 1045, 1049 (4th Cir. 1980) (§ 1985(3) was a "substantial federal claim" permitting pendent jurisdiction over state claims against clinic trespassers); Portland Feminist Women's Health Center v. Advocates For Life, Inc., 681 F.Supp. 688, 691 (D. Or. 1988) (retaining jurisdiction over state claims after § 1985(3) claim (not "right to travel") was dismissed).

demonstrated in Section II, infra, respondents' § 1985(3) claim, far from being foreclosed by prior case law, is fully supported by precedent.

Because of the substantial § 1985(3) claim, the district court had subject matter jurisdiction to hear the pendent claims. The court of appeals and the district court both held that the permanent injunction issued in this case is fully supportable under state law trespass and nuisance grounds. A45-A47; A137-A139. New York state appellate courts have routinely upheld injunctions granted on state grounds against similar attempts to block access physically to abortion facilities.⁴

⁴See, e.g., Parkmed Co., v. Pro-Life Counseling, Inc., 91 A.D.2d 551, 552, 457 N.Y.S.2d 27, 29 (1st Dep't 1982) (enjoining anti-abortion demonstrators from, inter alia, "blocking the ingress and egress to" an abortion clinic, and "physically abusing and harassing people"); O.B.G.Y.N. Assocs.

Petitioners do not challenge the state law bases for the injunction, and accordingly, even if they prevailed in challenging the lower courts' unanimous holdings under 42 U.S.C. § 1985(3) on the merits, the underlying judgment would not be disturbed.

Moreover, to the extent that the § 1985(3) claim raises constitutional questions, it has long been an established principle of this Court's jurisprudence that constitutional questions should be avoided if a judgment can be supported on non-constitutional grounds. Siler v. Louisville & Nashville Railroad Co., 213 U.S. at 191 ("we think it much better to decide [the case] with regard to the

v. Birthright of Brooklyn, 64 A.D.2d 894, 895, 407 N.Y.S.2d 903, 905 (2d Dep't 1978) (enjoining anti-abortion demonstrators from "barring any person from entering or exiting plaintiffs' premises").

question of a local nature ... rather than to unnecessarily decide the various constitutional questions appearing in the record"). Accord Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")⁵

Because the § 1985(3) claim involves constitutional issues and need not be reached to support the judgment below, the § 1985(3) claim is an improper basis for grant of a writ of certiorari.

⁵This rule is an important component of the "settled doctrine that we avoid constitutional questions whenever possible." West v. Atkins, 487 U.S. 42, 48 n.8 (1988); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 158 (1984); Massachusetts v. Westcott, 431 U.S. 322, 323 (1977); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

II. THE COURT OF APPEALS' DECISION ON 42 U.S.C. § 1985(3) IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR THE OTHER CIRCUITS.

Even if it were necessary to reach the 42 U.S.C. § 1985(3) claim in this case, petitioners fail to demonstrate any conflict with decisions of this Court or with those of other courts of appeals. The court of appeals unanimously held that respondents prevailed under § 1985(3) by demonstrating that petitioners conspired, with animus, to deprive a class of women of their right to travel to obtain medical services, by forcibly blocking their access to the medical facilities to which they traveled.

Petitioners challenge only two aspects of the court's ruling in this regard: its conclusion that gender-based animus is sufficient to support a § 1985(3) claim and its conclusion that petitioners' actions

infringed women's right to travel. Yet petitioners point to not a single decision of this Court or any court of appeals that holds to the contrary. Accordingly, petitioners have failed to demonstrate any basis for this Court to grant a writ of certiorari.

A. There Is No Conflict Among the Circuit Courts As To Whether Gender-Based Animus Is Sufficient To Support a Claim Under § 1985(3).

Section 1985(3) proscribes conspiracies to deprive persons of civil rights that are motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." United Bhd. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 835 (1983), quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The court of appeals found that petitioners' conspiracy here was motivated by animus against women, and held that such

animus constitutes class-based animus for purposes of § 1985(3). A40.

Contrary to petitioners' inaccurate and misleading chart, Pet. at 6-8, this holding is neither novel nor in conflict with the holdings of any other court of appeals. Every court of appeals that has directly addressed the issue has held that § 1985(3) reaches conspiracies motivated by gender-based animus.⁶ Petitioners' chart itself

⁶See Stathos v. Bowder, 728 F.2d 15, 20 (1st Cir. 1984); Life Ins. Co. of North Am. v. Reichardt, 591 F.2d 499, 502, 505 (9th Cir. 1979); Novotny v. Gt. Am. Fed'l Sav. & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978); cf. Long v. Laramie County Community College Dist., 840 F.2d 743, 752-53 (10th Cir.) (reversing summary judgment in defendants' favor in sexual harassment claim based on § 1985(3) and remanding), cert. denied, 109 S.Ct. 73 (1988); Padway v. Palches, 665 F.2d 965, 969 (9th Cir. 1982) (reversing summary judgment in defendant's favor in gender-based § 1985(3) claim and remanding); Northern Va. Women's Medical Center v. Balch, 617 F.2d 1045, 1049 (4th Cir. 1980) (upholding injunction against anti-abortion trespassers sought and obtained under § 1985(3) and on

demonstrates that courts of appeals in seven circuits have recognized gender-based animus under § 1985(3).⁷ No court of

state grounds).

Other courts have stated in dicta that gender-based animus may be actionable. Browder v. Tipton, 630 F.2d 1149, 1154 (6th Cir. 1989); Munson v. Friske, 754 F.2d 683, 695 (7th Cir. 1985); C & K Coal Co. v. United Mine Workers, 704 F.2d 690, 700 (3d Cir. 1983); Shortbull v. Looking Elk, 677 F.2d 645, 648 (5th Cir.), cert. denied, 459 U.S. 907 (1982).

Nor is Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) to the contrary. There, the court simply found as a factual matter that defendants' animus was not directed at women. Id. at 794. The district court and court of appeals here found that defendants' animus was gender-based. Moreover, in McMillan, women's access to the clinic was "secure" at all times, because there were no blockades, only pickets. Id. Therefore, the only "right" asserted was a non-existent "right not to hear speech that [plaintiffs] do not wish to hear" in a public forum. Id.

⁷Petitioners' chart is misleading in several respects. It identifies several cases as holding that § 1985(3) covers "only" race-based animus. Pet. at 6-8. In fact, none of the cases cited by petitioners stands for that proposition. Some expressly leave open the question of the reach of

appeals has held that gender-based animus is insufficient to state a claim under § 1985(3), and accordingly no conflict exists.

This Court has expressly left open the question of which classes beyond race are included within the ambit of § 1985(3).

§ 1985(3) beyond race. See Eitel v. Holland, 787 F.2d 995, 1000 (5th Cir. 1986). Others say that § 1985(3) requires some racial or perhaps other class-based animus. Daigle v. Gulf State Utilities Co., Local 2286, 794 F.2d 974, 978 (5th Cir.), cert. denied, 479 U.S. 1008 (1986); Mears v. Town of Oxford, Md., 762 F.2d 368, 374 (4th Cir. 1985). Still others cited as "race only" by petitioners include gender-based animus as within the reach of § 1985(3), Damato v. Wisconsin Gas Co., 760 F.2d 1474, 1486 (7th Cir. 1985), or suggest that it may be included, Grimes v. Smith, 776 F.2d 1359, 1365 n.10 (7th Cir. 1985). The other cases cited only hold that political and economic animus or animus against handicapped persons does not satisfy § 1985(3); they do not address gender-based animus.

Petitioners also fail to note that in five of the cases they cited to show existing conflict among the circuits on § 1985(3), Pet. at 6-8, this Court denied certiorari.

Scott, 463 U.S. at 837. In Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 389 n.6 (1979) (citation omitted), Justice White noted in his dissent that the majority of the court assumed that gender-based animus did fall within § 1985(3):

Although Griffin v. Breckenridge did not reach the issue whether discrimination on a basis other than race may be vindicated under § 1985(3), the [majority of this] Court correctly assumes that the answer to this question is "Yes".... It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)....

Distinctions based on sex have long been considered invidiously discriminatory, even where justified by grounds not expressly malevolent. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973). As the court of appeals stated, A41:

[i]t is untenable to believe that Congress would provide a statutory remedy against private conspiracies, the purpose of which is to deny rights common to every citizen, and exclude women as a class from the shelter of its protection.

Petitioners argue that their blockades are not directed against all women but only against those women who seek to enter medical facilities that provide abortions. But as the court of appeals recognized, the defendants in Griffin could similarly have argued that their actions were directed only against Blacks "travelling interstate with the perceived purpose of promoting civil rights." A42. The fact that defendants direct their animus towards women who seek to exercise their constitutional rights does not render their animus any less gender-based:

In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to do something that

the perpetrators found objection-
able....⁸

Id. (emphasis in original).

Petitioners' organized campaign seeks by sheer force of numbers to prevent women from exercising their constitutional rights, just as the Ku Klux Klan sought to prevent newly-freed slaves from exercising their constitutional rights. It was precisely this type of mob action that Congress sought to remedy in enacting

⁸In other cases involving clinic blockades, courts have found animus directed at a class of women who seek to enter the clinics sufficient animus for purposes of § 1985(3). Cousins v. Terry, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); Roe v. Operation Rescue, 710 F. Supp. 577, 581 (E.D. Pa. 1989); NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 712 F. Supp. 165, 169 (D. Or. 1988); Aradia Women's Health Center v. Operation Rescue, Civ. Action No. 88-1539 R, slip op. (W.D. Wa. July 7, 1989). But see National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168, 1171-72 (C.D. Cal. 1989) (Tashima, J.), appeal docketed, No. 90-5519 (9th Cir. Feb. 14, 1990) (stay granted on Feb. 17, 1990, pending appeal).

§ 1985(3).

B. There Is No Conflict Among the Circuit Courts As To Whether a Physical Blockade Impedes the Right To Travel.

Petitioners' only other allegation challenging the court of appeals' holding under § 1985(3) is that their blockades do not infringe upon the right to travel. The district court found to the contrary, based on undisputed evidence that women routinely travel from out of state to obtain services in the medical facilities targeted by petitioners.⁹ A109, A135.

Petitioners suggest that this case is distinguishable from Griffin v. Breckenridge, 403 U.S. 88 (1971), in which this Court held that private interference

⁹Petitioners' contention that there was no evidence that a particular respondent's right to travel had been infringed before injunctions were issued misses the point. The remedy sought here was injunctive relief; respondents established threat of future injury.

with the right to travel was actionable under § 1985(3), because petitioners' blockades are self-styled as "non-violent sit-in demonstrations." Pet. at 13. No case suggests that the right to travel is only protected against violent infringements, and not against "non-violent" but lawless walls of hundreds of persons literally stopping travel to a woman's destination.¹⁰

Petitioners assert no conflict among the circuit courts on this issue, for there is none.

¹⁰Petitioners' suggestion that the right to travel should only be protected against state action, Pet. at 12, has long been refuted. Griffin, 403 U.S. at 105-06.

**III. THE COURT'S IMPOSITION OF COERCIVE
FINES FOR CIVIL CONTEMPT IS FULLY
CONSISTENT WITH THIS COURT'S
PRECEDENT, AS REFLECTED MOST
RECENTLY IN SPALLONE V. UNITED
STATES.**

Petitioners argue that the coercive civil contempt fines imposed on them were actually penalties for criminal contempt, and therefore could not be imposed without a full trial. However, the fines are a classic example of coercive civil contempt.

The district court expressly included the threat of future fines in its temporary restraining order to coerce compliance, and only levied the fines after petitioners admitted in stipulated facts that they had violated the order with notice of its terms.

Petitioners neglect even to mention this Court's most recent affirmation that fines set forth in an order to coerce future compliance are civil, not criminal,

contempt sanctions. In Spallone v. United States, 110 S. Ct. 625 (1990), this Court recognized that an order containing such a sanction, the imposition of which is conditional upon contempt following entry of the order, falls within a court's "inherent power to enforce compliance with . . . lawful orders through civil contempt." 110 S. Ct. at 632, quoting Shillitani v. United States, 384 U.S. 364, 370 (1966).¹¹

Here, as in Spallone, the district court was faced with open contempt of an earlier

¹¹Hicks v. Feiock, 485 U.S. 624 (1988), from which petitioners quote, Pet. at 13-14, affirms this same principle. If the petitioner can avoid paying the threatened fine simply by obeying the court's order (here by allowing access to clinics targeted for Operation Rescue demonstrations), the contempt fine is remedial, conditional and civil in nature. Cases cited by petitioners, Pet. at 14-15, draw the precise distinctions drawn in Spallone, i.e., fines imposed to coerce compliance are civil; fines imposed to punish are criminal.

court order. On May 2, 1988, New York State Supreme Court Justice Cahn entered an order which prohibited petitioners from blocking access to abortion clinics. Petitioners promptly violated that order on May 3, 1988, and admitted as much in stipulated facts to the district court on May 4. Like the Spallone court, the district court here responded appropriately by including civil coercive sanctions in an order designed to secure future compliance. Petitioners decided not to comply, knowing the consequences. The imposition of the promised civil contempt fines after petitioners' admitted violations of the May 5 temporary restraining order was entirely appropriate. This Court need not grant

certiorari to restate the principles so recently enunciated in Spallone.¹²

¹²The remainder of the issues for which petitioners seek a writ of certiorari merit little comment. Summary judgment was perfectly appropriate, because there were no material issues of fact: petitioners admitted that they had blocked access to abortion facilities, and that they intended to do so in the future.

Petitioners' contention that their First Amendment rights are infringed by an injunction against blocking physical access to a medical facility is contrary to settled law. Cameron v. Johnson, 390 U.S. 611, 617 (1968); Adderley v. Florida, 385 U.S. 39, 47-48 (1966); Cox v. Louisiana (I), 379 U.S. 536, 554-55 (1965). Even petitioners concede that "temporarily blocking entry to an abortion center is not of itself protected by the First Amendment." Pet. at 20. Under the injunction, petitioners are free to demonstrate outside abortion facilities, so long as they do not block access to the facilities or subject patients to physical abuse or tortious harassment.

Finally, petitioners' arguments that respondents lack standing to seek injunctive relief and that sanctions for counsel-advised abuse of discovery were improper are without a shred of support in case law or logic.

CONCLUSION

The petition for a writ of certiorari
should be denied.

Dated: April 3, 1990
New York, New York

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, et
al.,

Petitioners,

- v. -

NEW YORK STATE NATIONAL ORGANIZA-
TION FOR WOMEN, et al.,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

RESPONDENT-INTERVENOR'S BRIEF IN
OPPOSITION TO A PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND
CIRCUIT

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QUESTIONS PRESENTED

1. Whether the City of New York may properly prosecute a state law claim for public nuisance?
2. Whether the contempt sanction of \$19,141, payable to the City of New York as compensation for excess costs incurred by petitioners' failure to comply with the district court's temporary restraining order, was civil or criminal in nature?

LIST OF PARTIES

Respondent-intervenor accepts the list of parties included by petitioners at page iii of their Petition for a Writ of Certiorari.



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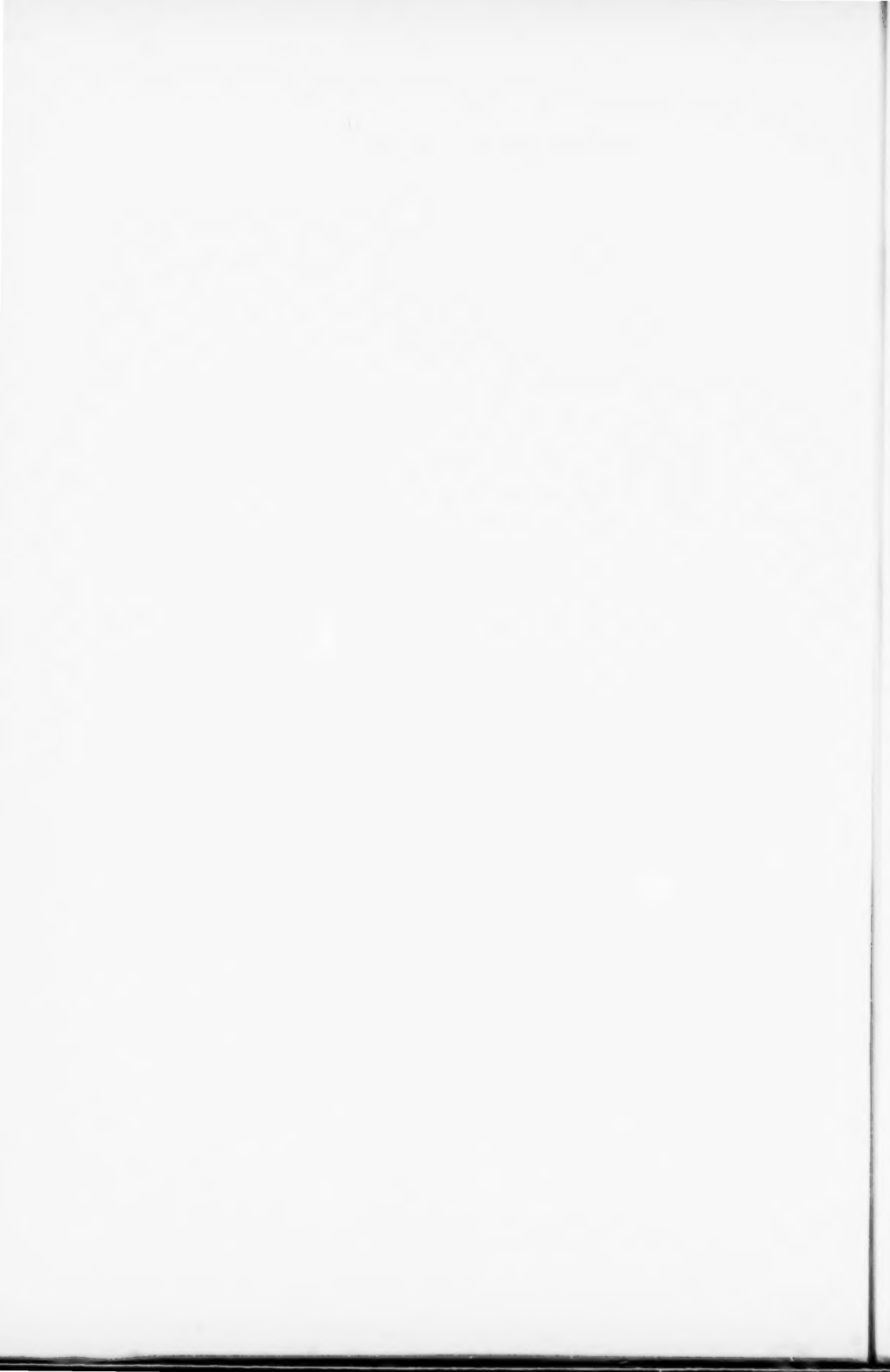
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IN THE
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OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, et al.,

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NEW YORK STATE NATIONAL ORGANIZA-
TION FOR WOMEN, et al.,

Respondents,

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RESPONDENT-INTERVENOR'S BRIEF IN
OPPOSITION TO A PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND
CIRCUIT

STATEMENT OF THE CASE

Petitioners seek review of a judgment of
the United States Court of Appeals for the

Second Circuit, which, with respect to the respondent-intervenor City of New York ("City"), upheld the validity of a permanent injunction issued by the United States District Court for the Southern District of New York (A47-51);¹ approved the assessment against petitioners of a contempt sanction of \$19,141, payable to the City, representing the additional costs incurred by the municipality by reason of petitioners' failure to comply with the prior notice provisions of a previous temporary restraining order (A26); and similarly approved discovery sanctions against petitioners and their attorneys (A36).

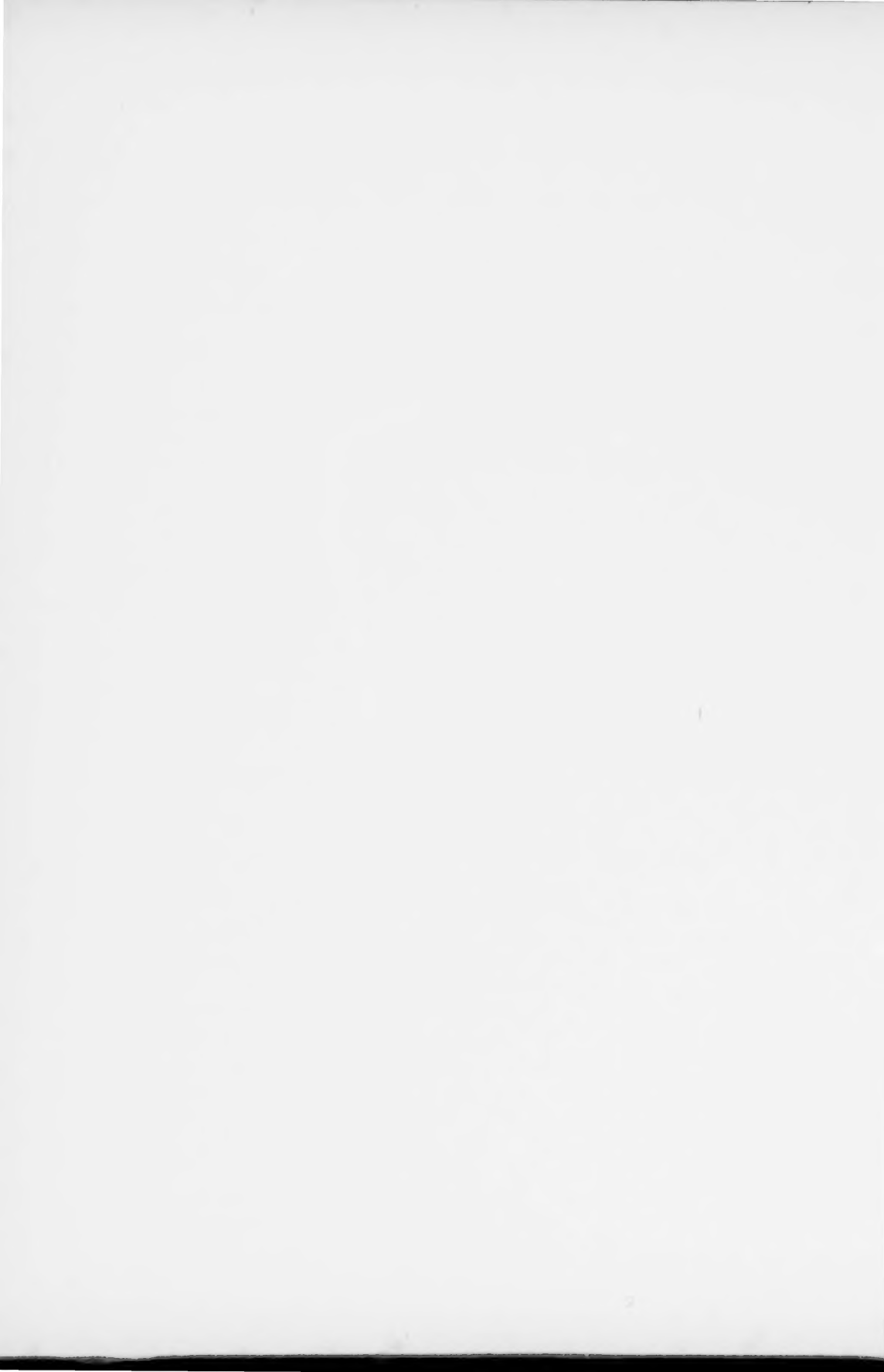
Both the preliminary and permanent injunctions in question prohibited petitioners, inter alia, from preventing "ingress into or egress from" any medical

¹ Numbers in parentheses prefaced by the letter "A" refer to pages in the Appendix submitted by petitioners with their Petition for a Writ of Certiorari.



facility at which abortions are performed in the City of New York, as well as in three surrounding counties (A54, A144-145). The orders further specified that petitioners would be liable for any "excess costs incurred as a result of [petitioners'] failure to provide the City with [twelve hours] advance notice of the location of their demonstration" (A55, A146), and stated that any failure to comply with the other terms of the injunction would subject petitioners to civil damages of \$25,000 per day (A54, A145).² Both injunctive orders specifically

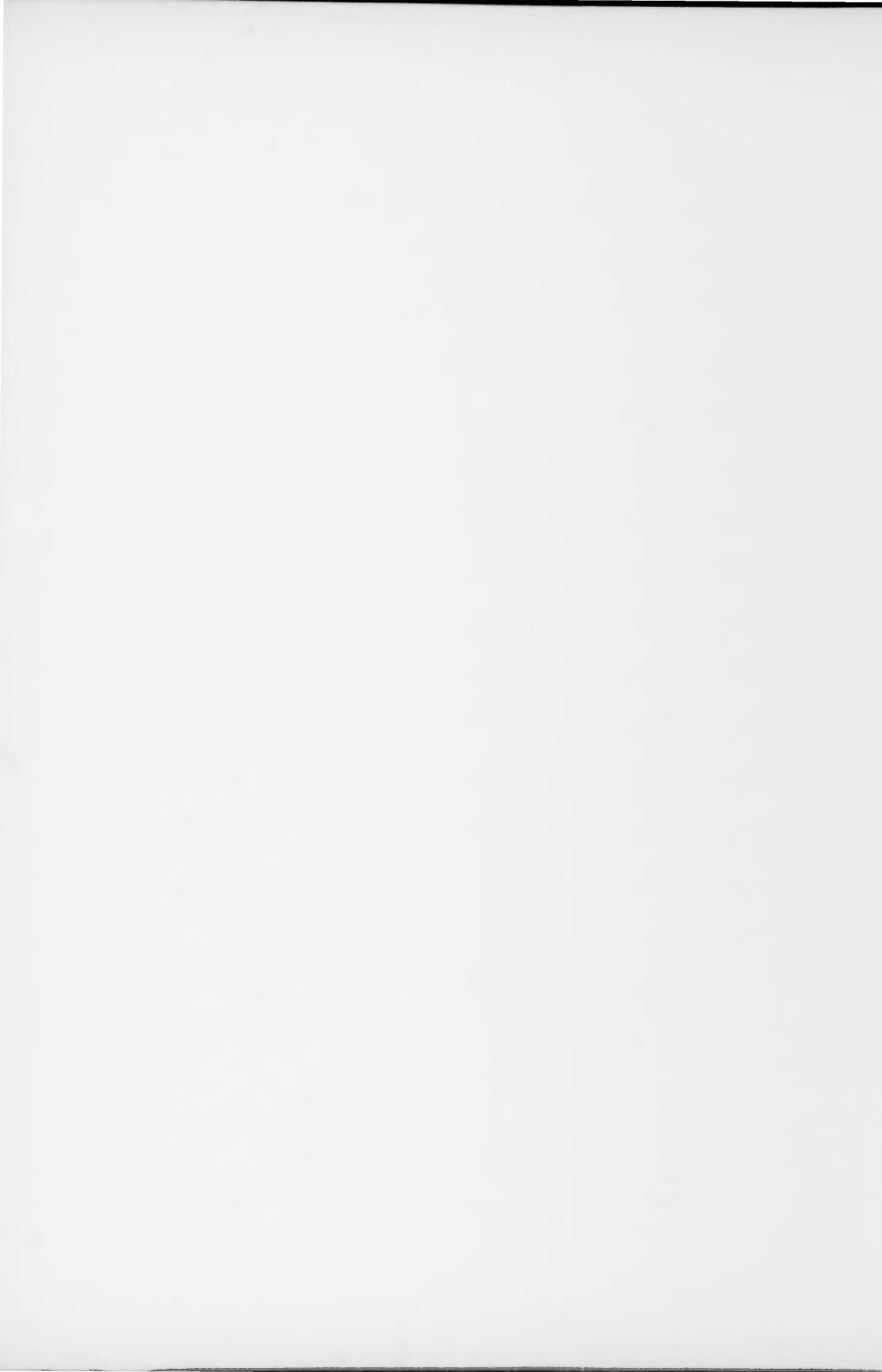
² The original temporary restraining order, dated May 5, 1988, directed that the \$25,000 be paid to the Court, "to be disbursed by further order of this Court" (A55). The permanent injunction, issued January 10, 1989, repeated this instruction but directed that the \$25,000 be doubled for each successive violation (A145). When respondents and respondent-intervenor sought contempt sanctions for violation of the May 5, 1988 order, the District Court ordered the \$25,000 per day paid to (Footnote Continued)



stated that they were not to be construed to limit petitioner's legitimate First Amendment rights (A54, A145).

The City entered this case on May 3, 1988, as a plaintiff-intervenor in New York State Supreme Court, where this suit was originally commenced in April 1988 by respondent NOW et al. (for purposes of this brief, the collective respondents will be referred to hereafter as "respondent NOW"). Intervention on a public nuisance theory was sought by the City when it became clear that police efforts could not assure access by the public to the medical facilities blockaded by petitioners. Within hours of the time when the City was granted intervenor status on oral motion in state court, petitioners

(Footnote Continued)
respondent National Organization for Women ("NOW") (A102-105). The Circuit Court upheld the amount of the sanction but ordered it paid to the Court rather than to respondent NOW.



removed the case to federal court, where the May 5, 1988 temporary restraining order challenged by petitioners was issued.

The City thereafter formally sought intervenor status in the district court, filing a complaint setting forth a state-law public nuisance claim (A170-175). Describing itself as suing "on behalf of itself and the people of the City" pursuant to section 394(c) of the New York City Charter, the City alleged that defendants were "endangering the public security, safety, and welfare of the City of New York and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed" (A171). The City requested the same declarative and injunctive relief sought by the original plaintiffs, plus an award of "damages to the City of New York commensurate with the amount expended by the City because of defendants' failure to



notify the City in advance of the site of their demonstration" (A174-175). The motion to intervene was granted nunc pro tunc by order entered July 19, 1988.

When petitioners defied the district court's May 5, 1988 temporary restraining order by blockading a medical facility on East 85th Street in Manhattan on May 6, 1988 without giving the required twelve-hour notice to the police, in addition to blocking access to a facility in Hicksville, Long Island, for three hours on the previous day, the City joined with respondent NOW in seeking contempt sanctions. The joint motion was granted by order entered October 27, 1988 (A102). As directed by the order, the City served and filed a statement documenting that it had incurred \$19,141 in excess costs due to the necessity of keeping police officers on call in all five boroughs because petitioners had not provided advance information on the location



of their previously announced May 6, 1988 demonstration (A106). Petitioners did not contest the reasonableness of the claimed costs, and they were approved by the district court on December 2, 1988 (A106). Judgment was entered December 9, 1988.

In addition to seeking contempt sanctions, the City joined with respondent NOW in a motion seeking discovery sanctions which resulted in entry of a judgment of \$16,142.75 against petitioners and their counsel (A76-77). It also joined with respondent NOW, on a public nuisance theory, in moving for the preliminary injunctive relief granted by the district court's October 27, 1988 order, which extended the terms of the May 5, 1988 temporary restraining order to activities threatened for Halloween 1988 (A109-114); and in moving for summary judgment and the permanent injunctive relief granted by the court's January 10, 1989 order (A115-144).



REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

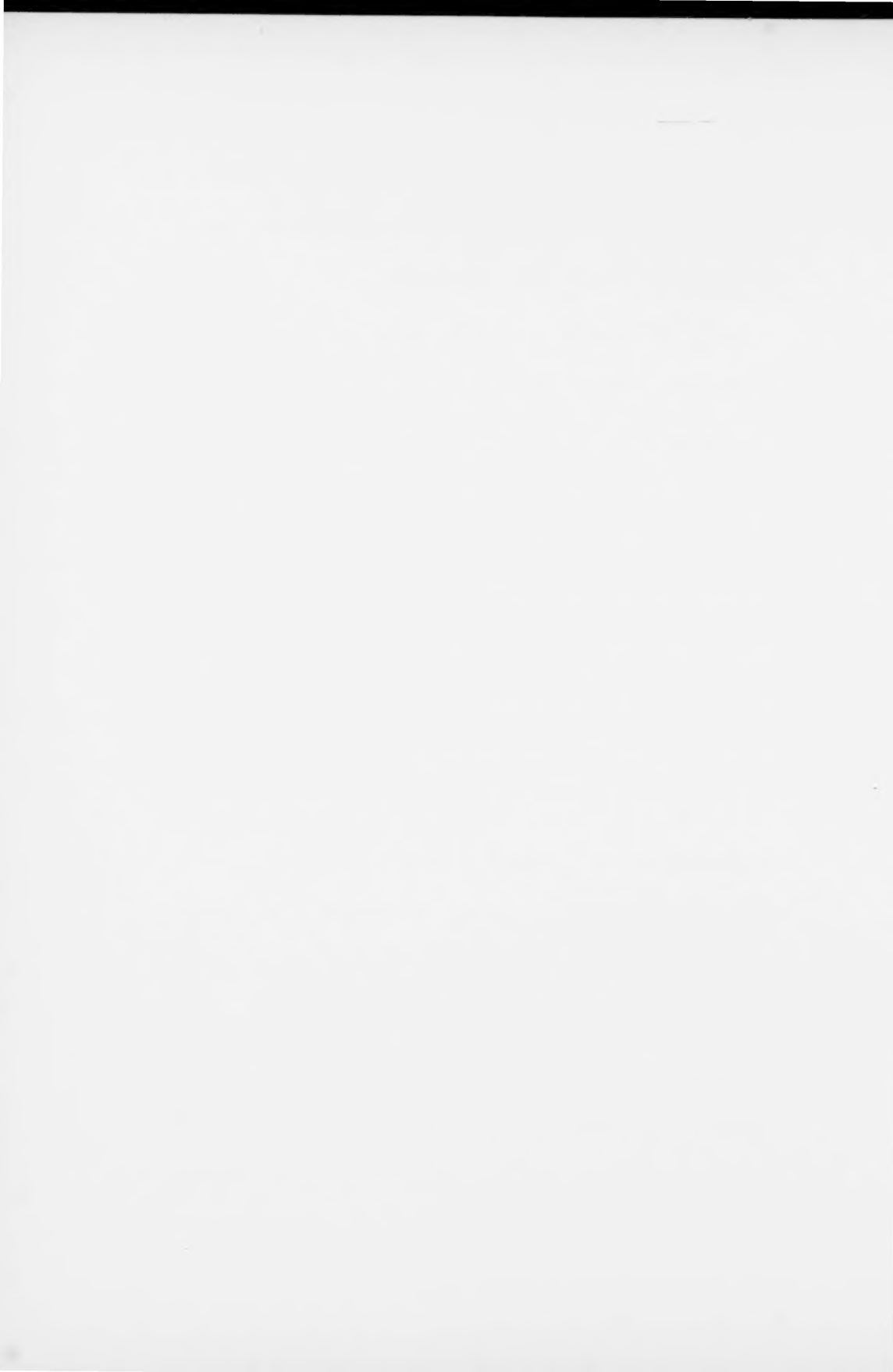
THE CITY OF NEW YORK'S
PUBLIC NUISANCE CLAIM
PROVIDES AN INDEPENDENT
STATE LAW GROUND JUSTIFYING
ISSUANCE OF THE CHALLENGED
INJUNCTION, AND PETITIONERS'
ATTACK ON THE CITY'S
STANDING TO PRESS THAT
CLAIM IS WITHOUT MERIT.

(1)

As respondent NOW notes in Point I of its brief in opposition to issuance of the requested writ, petitioners have declined to inform this Court that the challenged judgment rests not only on 42 U.S.C. § 1985(3), but on the state law grounds of trespass, asserted by respondent NOW et al., and of public nuisance, the claim pressed by the respondent-intervenor City of New York. As respondent NOW emphasizes in arguments that will not be repeated here, this Court need not reach the 42 U.S.C. § 1985(3) questions posed by petitioners because these alternative state

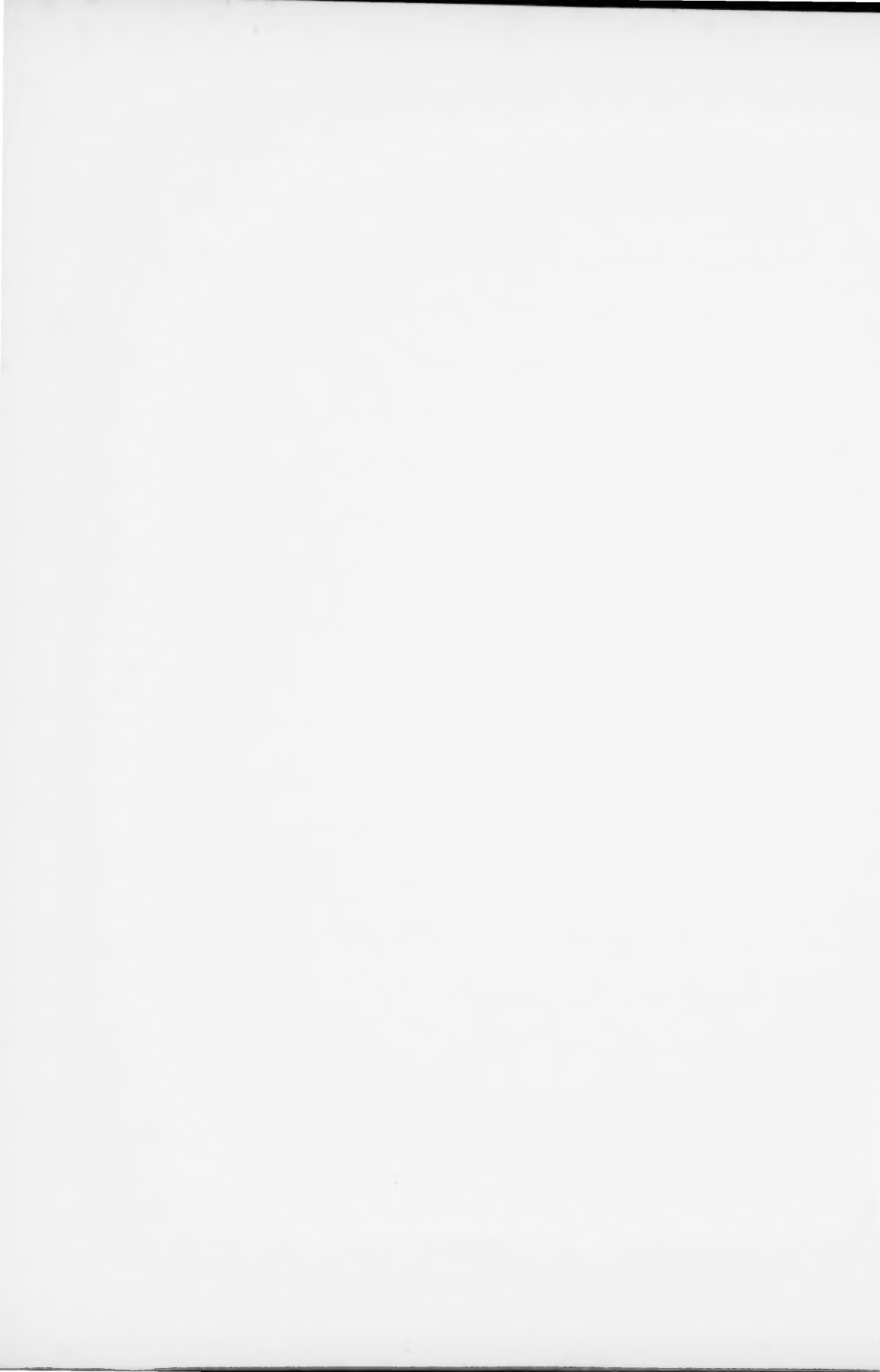
law grounds fully support the judgment. See, Respondents' Brief in Opposition at pp. 11-16, and cases cited therein.

Significantly, petitioners do not challenge the substantive rulings of the courts below upholding the viability of the City's state law public nuisance claim. Indeed, they could not. New York State's highest court has defined a public nuisance, inter alia, as conduct which interferes with the exercise of rights common to all in a manner such as to endanger or injure the property or health of a considerable number of persons. Copart Industries, Inc. v. Consolidated Edison Co., 41 NY2d 564, 568, 362 NE2d 968 (1977). Here, the City intervened to protect the right of the citizens of the City of New York to obtain medical services, a right with which petitioners concededly interfered by their admitted efforts not just to protest against, but to physically block access to health-care



facilities offering a wide range of medical, prenatal, and counseling services, in addition to the abortion services of which petitioners disapprove.

Petitioners' only attack on the rulings with respect to the City's public nuisance claim is couched in terms of a challenge to the City's standing. Inasmuch as it was petitioners who removed the case from state to federal court, this argument can only be termed disingenuous. Under state law, it is well-established that a municipality may properly prosecute a cause of action for public nuisance. New York Trap Rock Corp. v. Town of Clarkstown, 299 NY 77, 83, 65 NE2d 873 (1949); Town of Orangetown v. Gorsuch, 544 F.Supp. 105, 109 (S.D.N.Y., 1982), aff'd, 718 F.2d 29 (2nd Cir., 1983), cert. denied, 465 U.S. 1099 (1984). In order to obtain relief, there is no need for the State or locality prosecuting a nuisance action to prove



actual, as opposed to threatened harm, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2nd Cir., 1985), and resort to a nuisance action is appropriate where a defendant who intentionally endangers the public health has not been deterred by criminal prosecution. People ex rel. Bennett v. Laman, 277 NY 368, 14 NE2d 439 (1938).

Finally, although petitioners do not even attempt to explain how their removal of this case to federal court somehow destroyed the City's ability to prosecute a state law claim otherwise viable in state court, it is worth noting that the City has nevertheless met the traditional tests required to establish standing. Petitioners' own literature describing New York City as a future target of their activities, as well as evidence of the magnitude of the arrests, the degree of disruption, and the strain on the personnel and financial resources of the municipality engendered by the demonstrations on May 2



and May 6, 1988, establish the necessary "concrete injury or threat of injury" to the City itself. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

(2)

In addition to questioning one of the state-law bases on which the challenged injunction was issued by attacking the City's standing, petitioners also assert that its terms violate their First Amendment rights. More particularly, petitioners appear to argue that First Amendment protections should be extended to their efforts to prevent patients from entering targeted medical facilities. Inasmuch as petitioners themselves recognize that this Court has already considered and rejected similar propositions on several occasions (Petitioner's Brief at p. 20), objection to the challenged injunctive relief on this ground cannot serve as the basis for issuance of the requested writ. See, Cameron v. Johnson,



390 U.S. 611, 617 (1968); Adderly v. Florida, 385 U.S. 39, 47-48 (1966); Cox v. Louisiana, 379 U.S. 536, 554-555 (1965).

POINT II

THE IMPOSITION OF A COERCIVE FINE OF \$19,141 FOR CIVIL CONTEMPT, PAYABLE TO THE CITY OF NEW YORK AS RECOMPENSE FOR EXCESS COSTS INCURRED BY REASON OF PETITIONERS' FAILURE TO COMPLY WITH THE PRIOR-NOTICE PROVISIONS OF THE DISTRICT COURT'S MAY 5, 1988 TEMPORARY RESTRAINING ORDER, WAS ENTIRELY PROPER.

In addition to providing for a \$25,000 per day fine for any violation of its order restraining petitioners from blocking access to targeted medical facilities, the district court's May 5, 1988 order also provided that petitioners would be liable for any excess costs incurred by the City of New York by reason of petitioners' failure to provide the police with twelve hours advance notice of the location of any demonstration. Petitioners' attempt to characterize the latter

provision as a criminal rather than a civil contempt sanction, and so avoid payment of the \$19, 141 in itemized costs ordered by the district court, is completely without merit.³

This sanction fits precisely within the classic model of a civil contempt sanction, a sanction designed both to coerce future compliance with a court's order and to compensate a complainant for noncompliance. See, United States v. United Mine Workers of America, 330 U.S. 258, 303-304 (1947); Perfect Fit Industries v. Acme Quilting Co., 673 F.2d 53, 57 (2nd Cir., 1982), cert. denied, 459 U.S. 832 (1982). Furthermore, it is more than disingenuous for petitioners

³ The costs in question were occasioned by the need to maintain police personnel on call in all five boroughs of the City in preparation for handling the demonstration anticipated for May 6, 1988. As part of their tactics, petitioners refuse to disclose in advance the precise location of demonstrations.



to insist that they were improperly denied due process before imposition of the contempt sanction when they stipulated to the facts that established the act of contempt; refused, when requested, to supply any evidence establishing their claimed poverty; and did not contest, although given the opportunity, the itemized list of excess expenses supplied by the City of New York for approval by the Court.⁴

⁴ Admissions by petitioner that they had blocked access to health-care facilities, and intended to do so in the future, similarly render without merit petitioners' claim that summary judgment should not have been granted. With respect to the final issue involving the respondent-intervenor City of New York for which petitioners seek a writ of certiorari, the City agrees with respondent NOW that there is absolutely no support in the case law for petitioners' claim that imposition of discovery sanctions was improper.

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE DENIED.

May 1, 1990

Respectfully submitted,

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MAY 4 1990

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES F. LISANTE,
THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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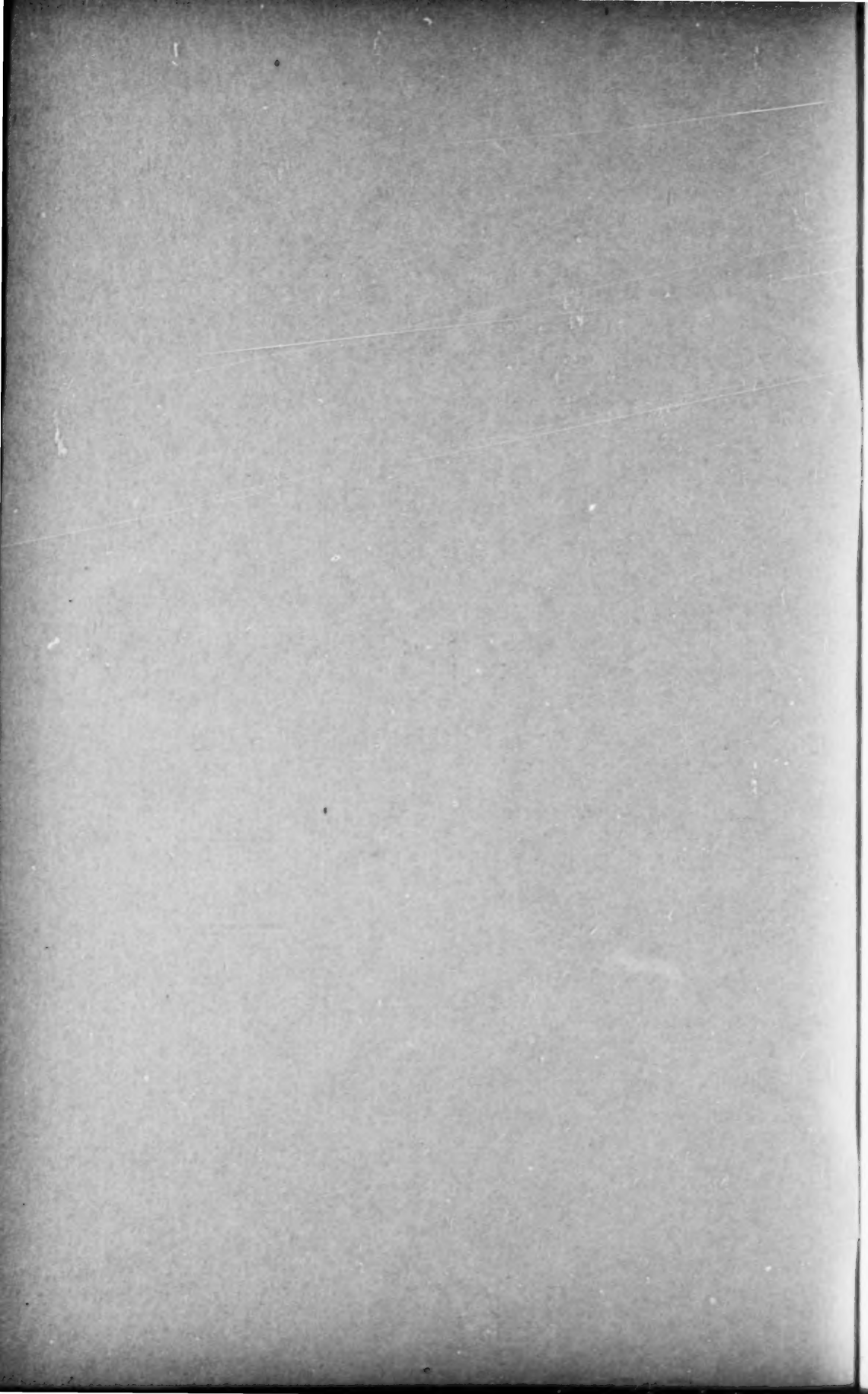


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IN THE
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OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P.
LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION
RIGHTS—NEW YORK METROPOLITAN AREA; NEW YORK
STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE,
INC.; PLANNED PARENTHOOD OF NEW YORK CITY,
INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PAR-
ENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD
CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGA-
RET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION;
THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH;
VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
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RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO CHOICE COALITION,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

REPLY BRIEF FOR PETITIONERS

Petitioners Randall Terry, Operation Rescue, Rev. James P. Lisante and Thomas Herlihy herein reply to the arguments raised in the Respondents Brief In Opposition ("Opp. Br.").

ARGUMENT

I.

RESPONDENTS CANNOT INVOKE PENDENT JURISDICTION TO REMEDY THE ABSENCE OF FEDERAL SUBJECT MATTER JURISDICTION

Respondents argument (Opp. Br., pp. 11-16) that certiorari should not be granted because the judgments below are allegedly supportable on state law grounds turns this Court's consistent pendent jurisdiction jurisprudence on its head. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), stressed that federal pendent jurisdiction is discretionary and "need not be exercised in every case in which it has been found to exist." Moreover, the "federal claim must have substance sufficient to confer subject matter jurisdiction on the court," 383 U.S. at 725. Where the federal claim to which the state claims are pendent is dismissed prior to trial, "even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well," 383 U.S. at 726. *See also, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1297 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); 3A J.W. Moore, *Federal Practice* ¶ 18.07 [1.-3] (2d ed. 1988); 13B Wright, Miller & Cooper, *Federal Practice & Procedure* ¶ 3567.1 (2d ed. 1984).

This Court has consistently turned aside attempts to expand the narrow jurisdictional exception afforded by *Gibbs* into an independent basis for federal jurisdiction over essentially state law claims. *See, e.g., Finley v. United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989); *Owen Equipment &*

Erection Co. v. Kroger, 437 U.S. 365 (1987); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973). Because the courts below erroneously concluded that Respondents had a substantial federal claim under 42 U.S.C. § 1985(3), they never addressed whether the *Gibbs* test for pendent jurisdiction is met. Petitioners' removal of Respondents' action as of right under 28 U.S.C. § 1441(b), which Respondents never contested, could not confer federal jurisdiction where it was lacking. *In re Winn*, 213 U.S. 458, 469 (1909). Therefore, the existence of colorable state law claims does not provide any basis for denial of certiorari here.

II.

THE FIRST AMENDMENT, THE RIGHT TO A FAIR TRIAL AND INDEPENDENT STATE GROUNDS

Other than a footnote, the Respondents' Brief is devoid of substantive argument concerning the First Amendment and the denial to Petitioners of a fair trial on "genuine disputes of substantial material facts" (Opp. Br. 20n.12). The circuit court decision, however, described the First Amendment issue as being the "principle question presented" in the appeal (A-3).

Respondents' dismissal of these issues is calculated to support the flawed argument that the lower court's holding that the Rescue demonstrations constituted trespass and public nuisance under State law, provide an independent basis to reject the Petition. The Respondents would have the First Amendment disregarded.

Defining the essence of an important and long-held principle, this Court has said that "no state law is above the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). A related, often stated principle is that "First Amendment freedoms may not be infringed absent a compelling governmental interest." *United Steelworkers of America v. Sadlowski*, 457

U.S. 102, 111 (1982); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); see also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

Indeed, no compelling State interest has been shown in this case. Genuine disputes of substantial material facts exist regarding whether risks of abortion to the mother's physical and psychological health outweigh the alleged risk of delaying an abortion by a few hours or at most one day (refuted by Dr. Nathanson, (A-219-220)), the lack of proof as to demonstrators' intent regarding class-based animus or to violate the injunction, interference with the Right to Travel, and the availability of the defense of "necessity" to protect the mother's and unborn child's life and health (Pet. at 16-19). These issues reach co-extensively to elements of the trial court's findings of "public nuisance" and "trespass". Depending on factual determinations, following discovery and a full hearing, the requisite threatened harm to public health and safety may not be found; present defenses may be proven or additional defenses may arise. The Respondents propose that the trial court's failure to permit discovery and a full hearing of the issues, and its failure to consider the point-by-point refutation of Respondents claims' in testimony by Dr. Nathanson (A-204 to 225) and Dr. O'Calaghan (A-237 to 250), be affirmed. Petitioners respectfully urge this Court to allow a fair trial on these issues and to deny the Respondents' attempt to short circuit proper constitutional adjudication on alleged State law grounds.

III.

THE DISTRICT COURT'S FINES WERE AN UNCONDITIONAL SENTENCE DECLARED IN ADVANCE FOR DETERRENT EFFECT AND WERE THEREFORE CRIMINAL IN NATURE

Respondents (Opp. Br. 27) state that, "Petitioners neglect even to mention * * * *Spallone v. United States*, 110 S.Ct. 625 (1990)," apparently overlooking Petitioners' citation of

Spallone (Pet. 24-25), and its inclusion in the Table of Cases (Pet. x).

Respondents also fail to notice the fundamental distinction between coercion and deterrence, as explained by this Court in *Hicks v. Feiock*, 485 U.S. 624, 631, 634 (1988) and *Shillitani v. United States*, 384 U.S. 364, 370 n.5 (1966). As held in *Feiock*, analysis must begin by focusing on the contempt proceeding itself:

"The critical features are the substance of the [contempt] proceeding and the character of the relief that the proceeding will afford." 485 U.S. at 631.

The contempt proceeding before the district court could be compared to *Spallone* if the district court had imposed a fine *unless* Petitioner Randall Terry promised *not* to engage in the conduct complained of and ordered his constituents not to do so. The fines would then be coercive because Petitioner could have *avoided* the fines by making the promise and giving the order. See *Feiock*, at 635, n.7.

Instead, the district court merely declared in advance the unconditional sentence which would be imposed if the amended Temporary Restraining Order were to be violated. The deterrent effect of the threatened unconditional sentence was derived from its absolute character. Any person who violated the order would be accused of a completed act of disobedience in any contempt proceeding which ensued. The unconditional sentence of a \$25,000 fine for each day the order was violated would be imposed upon a finding of guilt.

Mere knowledge of the unconditional consequences at the time of violation of a court order, whether those consequences are imprisonment or a fine or both, do not provide an opportunity, *at the time of the contempt proceeding*, to alter a completed act of disobedience. Thus, the substance of the contempt proceeding in the district court was to punish a completed act of disobedience and the "critical feature" of the remedy sought in that proceeding was the imposition of a

threatened unconditional fine without any opportunity to purge the alleged contempt. See *Feiock*, at 635, n.7.

Because they clearly lack the procedural protections required by this Court in proceedings for criminal contempt, and because Petitioners' counsel objected on this ground in the district court and in the court of appeals, the district court's contempt fines must be set aside.

IV.

SECTION 1985(3): CLASS-BASED ANIMUS

Seven years have elapsed since this Court's decision in *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983). During that time, a substantial "further study"¹ of § 1985(3) has taken place in the lower federal courts. Despite the Respondents' protests, the Petitioners' chart succinctly and accurately demonstrates the intolerable and widespread conflicts among the circuits and within the circuits on an important and recurring statutory issue: the scope of the class-based animus component of § 1985(3).

Either § 1985(3) is limited by the clear Congressional intent of 1871 prohibiting racial² or racially motivated political animus³ or the statute is "tied to evolving notions of equality and citizenship" (A-40), thus permitting judicial divining like that of the Second Circuit which allows any subgroup (women abortion-seekers) of a generally protected class (women) to receive the statute's protection, thereby turning § 1985(3) into a general federal tort law.

The time could not be riper for this Court to address itself to the vexing issue of the scope of permissible class-based

1 *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.)

2 *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173 (10th Cir. 1983)

3 *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986)

animus and grant its desperately needed guidance to the lower federal courts.

V.

SECTION 1985(3): RIGHT TO TRAVEL

The Respondents predictably attempt to bolster their Right to Travel claim by reliance on *Griffin v. Breckenridge*, 403 U.S. 88 (1971). A factual comparison of the conduct in *Griffin*, which was so close to the "core" of § 1985(3), to the public Rescue demonstrations reveals the following:

- *Griffin* involved the act of forcibly blocking travel on a State highway. Rescues occur on public sidewalks in the traditional manner of peaceful Civil Rights sit-in demonstrations.

- *Griffin* involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, non-violent demonstrations to protest the act of abortion at clinics and have nothing to do with free travel on public highways or streets.

- *Griffin* involved *racially, class based animus*, proscribed by law. Rescues involve the intent to non-violently protest abortion, to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).

- *Griffin* involved violent, racially based assaults interfering with highway travel and Civil Rights activity. Rescues, involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion facilities as a means of protecting and protesting the termination of unborn human life.

This "unusual and broad view"⁴ of the Right to Travel embraced by the Second Circuit must be addressed and

4 *Valley Forge College v. Americans United*, 454 U.S. 464, 470 (1982)

rejected by this Court, lest the combination of the Right to Travel and § 1985(3) transfigure the statute "to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin*, 403 U.S. at 101; *Scott*, 463 U.S. at 834.

CONCLUSION

For all of the reasons stated above and in the Petition, it is respectfully submitted that the Petition for Certiorari should be granted and that the issues raised therein should be addressed by the Justices of this Court.

Dated: May 3, 1990
New York, New York

Respectfully submitted,

/s/ JOSEPH P. SECOLA

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